IN THE

Supreme Court of the United States

October Term, 1974

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. [illegible]EZZI, Secretary of State of the State of New York, ARTHUR LEVIT[illegible] Comptroller of the State of New York, LAVERNE S. GRAF, Clerk o[illegible] the County Legislature, County of Niagara, New York and KENNE[illegible] COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

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for
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
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Lockport, New York,
Attorneys for Appellants.

February, 1976.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on January 9, 1975 by a three-judge District Court for the Western District of New York as reinstated and modified by that

Court's judgment of December 15, 1975. The December judgment amended the January judgment by making its terms applicable to a charter for Niagara County purportedly adopted in 1974 rather than to a charter purportedly adopted in 1972, the proposed 1972 charter having been the subject matter of this action and having been declared to be the law of Niagara County by the January judgment. In addition, the December judgment declared the case not to be moot, and enjoined the intervening defendants-appellants from prosecuting a pending action in the New York State Supreme Court challenging the validity of the purported 1974 charter.

The District Court's judgment of January 9, 1975, which the December 15, 1975 judgment reinstates and modifies, is the subject of an appeal to this Court docketed on May 5, 1975, as Case No. 74-1390.

On October 6, 1975, this Court issued the following order and judgment with respect to Case No. 74-1390:

> "This Cause having been submitted on the statement of jurisdiction, motion to affirm and suggestion of mootness,
>
> "On Consideration Whereof, it is ordered and adjudged by this court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974."

The District Court directed all counsel to appear on October 8, 1975. Limited argument was had at that time with respect to: (1) the issue of the mootness of the case, (2) a motion by the plaintiffs-appellees for permission to amend their complaint in order to have a hearing and proceedings with respect to the proposed 1974 charter, and (3) the course of action to be taken by the District Court with respect to the entire matter.

On October 23, 1975, the District Court entered its decision and order, which, among other things, amended the January judgment ". . . so that the 1974 charter, which supersedes the 1972 charter, is in full force and effect as the instrument defining the form of local government for Niagara County."

The Opinion Below

The opinion of the District Court for the Western District of New York dated October 23, 1975 appears as Appendix 1, *infra*, pages 1a-7a.

Jurisdiction

The jurisdiction of this Court to review the judgment of January 9, 1975 and the judgment of December 15, 1975 is conferred by 28 USC, Section 1253.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Jurisdictional Statement in Case No. 74-1390,* filed with the Court on May 5, 1975, which, with leave of the Court, is incorporated in its entirety as part of this Jurisdictional Statement.

The judgment of January 9, 1975 (Appendix B, Original Jurisdictional Statement) held that Article IX, Section

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* The Jurisdictional Statement filed by the intervening defendant-appellants in Case No. 74-1390 will be referred to as the "Original Jurisdictional Statement."

1(h)(1), of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York violate the guarantee of equal suffrage under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Questions Presented

The essential questions presented on this appeal are the questions propounded in the Original Jurisdictional Statement (pages 5 and 6). In view of the District Court's judgment of December 1975, the following additional questions are raised:

A. Has this case become moot as a consequence of the destruction of the subject matter of the action, that is, the proposed 1972 charter, by the intervening purported adoption and implementation of a superseding charter in 1974?

B. Did the District Court exceed its jurisdiction in ordering in December 1975 that its January judgment be amended to declare the 1974 charter to be in full force and effect rather than the 1972 charter, particularly in view of the facts that:

i. The case as filed, presented and decided dealt wholly and solely with the proposed validity and controlling effect of the 1972 charter;

ii. The District Court *itself* in the first instance refused to have its judgment of January 9, 1975 apply to validate and to require the implementation of the 1974 charter on the apparent grounds that the 1974 charter and the facts and circumstances relating to its purported adoption were not part of the case before the District Court, and the District Court therefore had no jurisdiction with respect to the 1974 charter; and

iii. No proceedings or hearings relating to the 1974 charter have been had or permitted.

C. Does 28 USC, Section 2283, afford the District Court authority to enjoin the prosecution of a pre-existing action in the courts of the State of New York relating to the validity of the proposed 1974 charter, specifically since that action alleges procedural and other deficiencies as to the attempted implementation of that charter?

Statement of Case

This action was commenced to obtain a judgment declaring that a proposed charter for Niagara County put to referendum in 1972 was validly adopted and thus the governing law of the County of Niagara, despite the fact that it did not obtain the votes required by the New York State Constitution and by the Municipal Home Rule Law of the State of New York for adoption.

All pleadings, arguments and briefs in the case were directed to the question of the implementation of the 1972 charter.

The District Court rendered its decision on November 24, 1972, granting the relief sought and ordering the State and County officials to implement the 1972 charter as the governing law of Niagara County.

In the interim, however, and prior to the handing down of this decision, a new and different charter was put to referendum in 1974. This charter also failed to obtain the votes required by the New York State Constitution and the Municipal Home Rule Law. Prior to the entry of judgment on the basis of the November 24, 1972 decision, a request was made to have that judgment apply to validate and to implement the 1974 charter rather than the

1972 charter which was the subject of the action. That request was denied by the District Court on the ground that since there had been no consideration of the charter put to referendum in 1974, or the circumstances of that referendum, and since the case which the Court had before it dealt wholly and solely with the charter put to referendum in 1972, the Court did not have jurisdiction to make its judgment apply to the charter put to referendum in 1974. Based on this refusal, the judgment entered by the District Court on January 9, 1975 specifically declared that the charter purportedly adopted in 1972 was the governing law of the County of Niagara and specifically directed the State and County officials to implement that charter.

After the intervening defendants perfected an appeal to this Court from the January 9, 1975 judgment (Docket No. 74-1390), it was discovered that, with the concurrence of the initial petitioners in the action, the State and County governmental respondents were not implementing the 1972 charter, but in fact were proceeding to attempt to implement and to enforce as the governing law of the County the 1974 charter.

As a consequence of this intervening conduct on the part of the initial parties to the proceeding, the intervening defendants made an application to the District Court to vacate the judgment of January 1975 on the ground that the initial parties to the proceeding had destroyed the subject matter of the action and had effectively made the case moot. Significantly, the Niagara County appellees, who had themselves instituted an unsuccessful action in the District Court to have the 1972 charter declared valid,[1] represented to the District Court as well as to this Court

[1] Original Jurisdictional Statement, Appendix D, pp. 24a-28a.

that the case had indeed become moot. The District Court at that point refused to grant the application to vacate the judgment on the ground that the reasons underlying the application were not "within the purview of Federal Rules of Civil Procedure Rule 60." Thereafter, this Court requested the parties to file briefs on the issue of mootness, and that was done.

On October 6, 1975, this Court entered an order and judgment vacating the District Court January 1975 judgment and remanding the cause to the District Court ". . . for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974."

No hearings were had in connection with the remand to the District Court. Instead, counsel for the parties were summoned for oral consideration of the matter. In recognition of the Court's lack of jurisdiction to effect a *nunc pro tunc* revision of the January 1975 judgment to apply to the proposed 1974 charter, the original petitioners in the action filed a motion to amend their complaint to raise the issue of the validity of the 1974 charter and to have the Court hold hearings with respect to the circumstances surrounding the November 1974 referendum and the proposed validation of the purported 1974 charter. The District Court denied that motion for amendment of the complaint, ruled that the case had not become moot, and amended its January 1975 judgment in order to make that judgment applicable to the 1974 charter. This appeal followed.

I. This Case has Become Moot; the Judgments of January 19, 1975 and December 15, 1975 should be Reversed and Vacated.

Arguments concerning the mootness of this case have been presented to this Court in briefs filed in Case No. 74-1390. The intervening appellants respectfully refer the Court to those points.

II. The District Court Exceeded its Jurisdiction in Entering the December 1975 Declaratory Judgment that the 1974 Niagara County Charter is in Full Force and Effect as the Form of Local Government for Niagara County.

A. The District Court is without authority to render judgment on a matter not placed in issue by the pleadings and not a subject of the action.

It is fundamental that a court cannot act *sua sponte,* but must await the action of some person invoking its jurisdiction. In declaring the 1974 charter to be the instrument defining local government in Niagara County, the District Court was, in effect, invoking its own jurisdiction. The validity of the 1974 charter was not placed in issue by the pleadings in this case. There were no hearings or proceedings with respect to the 1974 charter. Indeed, the District Court itself specifically refused to have its original January 1975 judgment apply to the 1974 charter for the very reason that that charter was not before the Court, not part of the case, and therefore beyond the jurisdiction of the Court. Nor was the 1974 charter's validity "tried by express or implied consent of the parties" within the meaning of Section 15(b) of the Federal Rules of Civil Procedure. In fact, the District Court denied petitioners' motion to amend the complaint in the action in order to

give the Court jurisdiction and to have hearings with respect to that charter. Nevertheless, the Court below presumed to enter a judgment declaring that charter to be the law of the County of Niagara.

In attempting to justify this unusual judgment, the District Court stated that:

> "The 1974 charter is already part of the record in this case and the United States Supreme Court has specifically directed us to consider it."

We have the following observations as to this proffered justification:

1. The record in this case, with respect to the issues presented by the petition, became complete upon entry of the District Court's judgment determining those issues on January 19, 1975. The purported 1974 charter was not part of that record.

2. The District Court itself initially refused to consider the 1974 charter on the very ground that it was *not* a part of the case and therefore beyond its judisdiction.

3. The appeal of the intervening defendants to this Court was from the January 1975 judgment, which related wholly and solely to the 1972 charter.

4. The sole relevance of the 1974 charter to this case and to the appeal is with respect to whether the purported adoption and the actual implementation of that charter rendered this case moot.

5. At various times during proceedings relating to the District Court's January 1975 judgment, all parties to the action conceded that the District Court did *not* have jurisdiction over the 1974 charter and could not render any judgment with respect to it.

6. The direction of this Court to the District Court on October 6, 1975 was to *reconsider the case before it* in light of a subsequent legislative development as that legislative development might make the case before the Court moot. It was not a direction to the Court to consider the *validity* of the subsequent legislative development, or to enter a declaratory judgment concerning the enforceability or governing effect of that legislative development.

The District Court exceeded its jurisdiction in attempting to render a judgment declaratory of the validity or enforceability of the 1974 charter.

B. The District Court's declaratory judgment constitutes an impermissible interference with pending state court proceedings.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court considered the propriety of federal court injunctions restraining pending state criminal prosecutions. The Court held that federal injunctions against pending state criminal actions can be issued only under *extraordinary circumstances* where the danger of irreparable harm is both *great* and *immediate*. In *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion case to *Younger v. Harris, (supra)* the Court held that:

> "The same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." (401 U.S. 66, at 73)

Although this Court did not equate declaratory judgments and injunctions in all cases, it limited the situations in

which a declaratory judgment would be permissible where an injunction would not to the following:

> "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief." (401 U.S. 66, at 73)

The basic rationale underlying *Samuels* was a concern that *Younger* would be effectively emasculated by the use of federal declaratory judgments which would have effects identical to those injunctions. As the Court noted:

> "The practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (401 U.S. 66, at 73)

In the case at hand, both a declaratory judgment and an injunction have been issued by the District Court. The District Court has erroneously decided matters currently pending before a state tribunal. Its judgment not only violates the statutory prohibition against federal court interference with state court matters (28 USC, Section 2283), but the judicial prohibition against such interference set forth in *Younger* and its progeny.

On June 27, 1975, the Town of Lockport commenced an Article 78 proceeding challenging the attempt by the Secretary of State of the State of New York to certify, implement and enforce the 1974 charter. This proceeding was pending at the appellate level when the District Court sought—again on its own motion and without application of any party—to declare the 1974 charter to be the governing law of the County.

In *Steffel v. Thompson,* 415 U.S. 452 (1974), the Supreme Court held that *Younger's* requirement of exceptional circumstances to justify federal declaratory relief against state criminal prosecution was inapplicable when a prosecution was not *pending.* In June of this past year, the Court amplified its holding as to the necessity of a "pending" proceeding in *Hicks v. Miranda,* 45 L.Ed.2d 223 (1975), where a state court proceeding which was begun on the day *following* the completion of service of the complaint in a federal court proceeding seeking declaratory relief was held to be a pending proceeding within the meaning of *Steffel v. Thompson, (supra).* The Court noted that:

> "We now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but *before any proceedings of substance on the merits have taken place in the federal court,* the principles of *Younger v. Harris* should apply in full force. Here, appellees were charged on January 15, prior to answering the federal case and *prior to any proceedings whatsoever before the three-judge court.* Unless we are to trivialize the principles of *Younger v. Harris,* the federal complaint should have been dismissed on the State's motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of of *Younger v. Harris* and related cases." (Emphasis added, 45 L.Ed. 2d 223, at 239)

Lockport's Article 78 state court proceeding was commenced on June 27, 1975. It was not until October 6, 1975 that this Court directed the District Court to consider the question of mootness in light of the 1974 charter. In presumed response to that direction, the District Court entered its declaratory judgment validating the 1974 charter. By that time, the state court proceeding attacking the validity of the 1974 charter had been pending for six (6) months, and the state court of first instance had already rendered a

decision and judgment, from which an appeal was pending. The 1974 charter was never the subject of "any proceedings of substance on the merits" in the federal courts. Thus, the District Court has improperly interfered with a pending state court proceeding.

The *Younger* doctrine should be applied in the instant case. In *Huffman v. Pursue,* 43 L. Ed.2d 482 (1975), this Court held that *Younger* applied to an Ohio civil proceeding, stating:

> "The component of *Younger* which rests upon the threat to our federal system is . . . applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."

The Court carefully limited the scope of its decision to the particular civil statute at hand, and, thus, left open the much broader question of the applicability of *Younger* to state civil proceedings in general. However, the Court took cognizance of the Federal Circuit Court decisions in which *Younger* has been held to be applicable to state civil proceedings and noted that:

> "The seriousness of federal judicial interference with state civil functions has long been by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

At issue in the New York Article 78 proceeding is the acknowledged and exclusive right of a state to determine what subordinate governmental instrumentalities it will create to assist in carrying out vital state governmental functions, what structures those instrumentalities will have, and what procedures will be required prior to the implementation of any plan to create such instrumentalities.

These issues, central to the very authority of state government in the State of New York, have been foreclosed from consideration by its courts by the decision of the District Court.

If this Court is not prepared to extend the prerequisites to federal interference with state criminal proceedings set forth in *Younger* to *all* civil cases, we submit that those prerequisites should apply to those cases which involve questions of state governmental administration. A showing of either "extraordinary circumstances" or "great and immediate" harm should be as necessary in this class of cases as it is in criminal prosecutions. Surely, cases such as these are as vital to state interest as are criminal prosecutions and nuisance abatement proceedings.

Additionally, the District Court has wholly failed to abide by the generally applicable "standards of restraint" which the notions of comity and federalism (as well as those of equity jurisprudence) demand.

III. The District Court's Injunction Prohibiting the Town of Lockport from Proceeding with the Pending State Court Action was Improper.

The arguments advanced above with respect to the District Court's declaratory judgment apply with equal force to the injunction portion of its judgment.

28 US Code, Section 2283, provides:

> "A court in the United States may not grant an injunction to state proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The mandate of Section 2283 applies with equal force to an injunction directed at the parties as it does to an injunction directed at the state court itself, *Dresser Industries, Inc. v. Insurance Co. of North America*, 358 F.Supp. 327 (N.D. Texas, 1973), aff'd. without opinion for 75 F.2d 1402.

The District Court attempted to justify its injunction as having been rendered "in order to protect the judgment of this court". However, the 1974 *per curiam* opinion of the Supreme Court in *Poe v. Gerstein*, 94 S.Ct. 2247 (1974), stands for the proposition that an injunction of state court proceedings to protect the judgment of a federal court is unjustified in the absence of an allegation that the state court would not respect federal court's judgment:

> "The District Court properly refused to issue the injunction; for there was 'no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision . . . holding the challenged ordinance unconstitutional, *Douglas v. Jeannette*, 319 U.S. 157, 165, 87 L.Ed. 1324, 63 S.Ct. 877 (1943).'"

Here, there has been no allegation that the state court would not respect the federal court's decision. Indeed, the lower state court in the pending Article 78 proceeding felt itself bound to accept the decision of the District Court as to constitutionality with respect to the 1972 charter. In the absence of any indication that the courts of New York State will not respect the federal court's decision, this injunction is improper.

As stated in *Atlantic Coast Line Railroad Co. v. Brotherhood of Engineers*, 398 U.S. 281, 297 (1970):

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an

orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

Moreover, Lockport's state proceeding raises issues other than the constitutional issues which were at issue in the District Court. Lockport's petition alleges that there were numerous procedural defects in connection with the filing of the 1974 charter which mandates its revocation and recission (see paragraphs 16, 17, 18 and 19 of the petition). If the injunction is allowed to stand, the Town of Lockport will be forever foreclosed from obtaining a determination of those issues. Certainly it cannot be reasonably argued that foreclosure of these procedural issues is necessary to effectuate the judgment of the District Court.

IV. The District Court's January 19, 1975 and December 15, 1975 Judgments should be Reversed and Vacated.

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants,
Town of Lockport and Floyd Snyder.

February 1976.

APPENDIX 1

Decision of the United States District Court for the Western District of New York, Entered on October 23, 1975

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

v.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants-Appellees,

and

THE TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants-Appellants.

Civ-1973-222

Appearances:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe (John J. Phelan, Esq., of Counsel), Buffalo, New York, for Plaintiffs-Appellees.

Appendix 1—Decision of the United States District Court for the Western District of New York, Entered on October 23, 1975

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Michael G. Wolfgang, Esq., of Counsel), Buffalo, New York, for Defendants-Appellees Ghezzi and Levitt.

Samuel L. Tavano, Esq., Niagara County Attorney, Lockport, New York, for Defendants-Appellees Graf and Comerford.

Hodgson, Russ, Andrews, Woods & Goodyear (Victor T. Fuzak, Esq., of Counsel), Buffalo, New York, for Intervening Defendants-Appellants.

CURTIN, Chief Judge:

On October 6, 1975 the United States Supreme Court entered the following order in the above entitled case:

> The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new chapter [sic] adopted by Niagara County in 1974.

In view of this direction, and with the consent of the other judges on the panel, I scheduled oral argument on October 8, 1975 and all parties were present. The parties stipulated that the 1974 Charter and also the proceedings in the New York State courts in which the Town of Lockport sought to invalidate the 1974 Charter be marked as exhibits in this case. In that action, Justice Joseph P. Kuszynski, on July 31, 1975, issued a decision in which he cited the action taken by this panel as controlling in his holding that Article IX, Section (1)(h)(1) of the Constitution of the State of New York and Section 33(7) of the

Appendix 1—Decision of the United States District Court for the Western District of New York, Entered on October 23, 1975

New York State Municipal Home Rule Law are unconstitutional. The Citizens for Community Action were not named as parties in the state court action. The following is a brief summary of the various arguments made and positions taken by the parties at oral argument.

First of all, the plaintiffs filed a motion to amend the complaint. It is the purpose of the amended complaint to make the 1974 Charter part of the proceedings in this case. Procedurally, plaintiffs' theory is that the election in November proceed as planned; that the Town of Lockport be permitted to litigate the amended complaint before the three-judge court; and that for the present the court hold ruling on the remand until the court has heard full arguments from the Town. It is plaintiffs' opinion that the case is not moot, that it should be further litigated in federal court, and that there should be no abstention.

The New York State defendants agree that the case is not moot and that there should be a final determination by the Supreme Court. It is the intention of the Secretary of State to permit the 1974 Niagara County Charter to go into effect. When questioned about statewide application, it was first stated that if the question arose in other counties, the State would not follow our decision but would follow state law requiring a double majority. However, it was also stated that since Justice Kuszynski in state court has now held the same section unconstitutional following our decision, for the present the State would not apply the section to other elections in the state. Apparently, the State does not plan to appeal Justice Kuszynski's

decision. It is the State's position that the court should not be concerned with the provisions of the Charter, but only with the manner in which the referendum was conducted. As to the proposed amended complaint, the State questioned whether the court would be following the Supreme Court's order if it allowed the complaint to be amended.

The Niagara County defendants did not object to the amended complaint as long as the November election was allowed to proceed. In their opinion, the case is not moot and should be litigated in federal court.

Finally, the intervenor-defendant, Town of Lockport, informed the court that the Town intended to appeal Justice Kuszynski's decision, but nevertheless wants this court to hold that the question is moot. The Town admitted that there are no substantial differences between the 1972 and 1974 Charters, but argued that there was a difference in circumstances, perhaps a difference in political climate, at the time the Charters were voted upon. The other parties are of the view that the differences between the 1972 and 1974 Charters are minimal. The Town argues that this lawsuit is moot because the 1974 Charter is now certified, thus making the validity of the 1972 Charter no longer an issue warranting resolution by this court.

After considering all of the above arguments, the court finds that this lawsuit is not moot. First of all, as admitted by the Town of Lockport and as is evident from a perusal of the 1972 and 1974 Charters, there is no substantial difference between the two Charters. The only differ-

ences are merely technical ones relating to the functions and duties of the various officers and branches of the proposed county government. The Town of Lockport's argument that there was a difference in political climate when the voters approved each Charter is simply irrelevant to a determination of whether the sections are constitutional. In this regard, it should be noted that each Charter was approved by a majority of the voters of Niagara County, with a majority of city voters but a minority in the rural areas.

In an effort to counter the mootness argument raised by the Town of Lockport, plaintiffs have moved this court to grant the amendment of the complaint to include the 1974 Charter. However, this course of action is not necessary since the 1974 Charter is already part of the record in this case, and the United States Supreme Court has specifically directed us to consider it. The motion of the plaintiffs to amend the complaint is therefore denied.

The court rejects the Town of Lockport's mootness argument because the problem presented in this case is one which is capable of repetition yet evading review. *Moore v. Ogilvie,* 394 U.S. 814 (1969). If this court were to rule that the case is moot, there is a reasonable expectation that the wrong complained of by plaintiffs would be repeated, a consideration warranting against a holding of mootness. *United States v. W. T. Grant & Co.,* 345 U.S. 629, 633 (1953). Furthermore, the certification of the 1974 Charter has done nothing to diminish the definite and concrete nature of the controversy between the parties, and

this controversy continues to touch upon the legal relations of the parties to this lawsuit who have adverse legal interests. Under *Aetna Life Ins. Co. v. Hawarth*, 300 U.S. 227, 240-241 (1937), this consideration warrants a finding that there still exists an actual case or controversy necessary for this court to retain jurisdiction and render a final determination. *U. S. Const. Art. III.*

For these reasons, the judgment of this court rendered on January 9, 1975 holding Article IX(1)(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York unconstitutional is hereby reinstated and in full force and effect. In addition, the January 9, 1975 judgment is hereby amended so that the 1974 Charter, which supersedes the 1972 Charter, is in full force and effect as the instrument defining the form of local government for Niagara County. It is further ordered that, pursuant to 28 U.S.C. § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the state court action.

I have conferred with the other members of the panel and they have given me authority to enter the present order and to sign for them. This order shall become effective upon filing, and the parties may proceed further in accordance with the Rules of Federal Practice.

So ordered.

/s/ WILLIAM H. TIMBERS JTC
WILLIAM H. TIMBERS
United States Circuit Judge

/s/ HAROLD P. BURKE JTC
HAROLD P. BURKE
United States District Judge

/s/ JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

Dated: October 23, 1975.

APPENDIX 2

Judgment Entered December 15, 1975

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

vs.

MARIO M. CUOMO, as Successor to JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LA VERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants-Appellees,

and

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants-Appellants.

Civ-1973-222
Sup. Ct. Doc.
No. 74-1390

This cause having come on to be heard, on the 8th day of October, 1975 before the Honorable John T. Curtin, U.S. D.J., one of the members of a statutory three-judge district court, convened in this cause pursuant to 28 USC §§ 2281 and 2284 consisting of the Honorable William H.

Timbers, Judge of the United States Court of Appeals for the Second Circuit and the Honorable Harold P. Burke and the Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, after a judgment of the identical Court granted the 9th day of January, 1975 was vacated by the Supreme Court of the United States in an order entered on the 6th day of October 1975 as follows:

> The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provision of the new chapter (sic) adopted by Niagara County in 1974.

Now upon the order of the Supreme Court of the United States entered the 6th day of October 1975 and upon the documents filed in the Supreme Court of the United States including the briefs of all parties and a motion having been made by the plaintiffs-appellees to amend the complaint in the action to set forth a cause of action for declaratory and injunctive relief pertaining to the 1974 Niagara County Charter and upon the transcript of the oral argument of the attorneys for all parties to the action heard by the Honorable John T. Curtin, U.S.D.J., one of the members of the Special Statutory District Court on the 8th day of October 1975 at the United States Court House in Buffalo, New York at which time the plaintiffs-appellees were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach and Smythe of Buffalo, New York and the defendants-appellees Mario M. Cuomo, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney-

General of the State of New York, Michael G. Wolfgang and Douglas J. Cream, assistant Attorneys-General, of counsel and La Verne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk, County of Niagara, New York were represented by Samuel L. Tavano, County Attorney, County of Niagara and the intervening defendants-appellants were represented by Victor T. Fuzak of the firm of Hodgson, Russ, Andrews, Woods, and Goodyear of Buffalo, New York and the court having considered the issues remanded and an opinion having been signed and filed on the 23rd day of October 1975 written by the Honorable John T. Curtin, U.S.D.J., in which the Honorable William H. Timbers, U.S.D.J., and the Honorable Harold P. Burke, U.S.D.J. concurred and due deliberation having been had, it is therefore

ORDERED, ADJUDGED AND DECREED that this cause is not moot and it is further

ORDERED, ADJUDGED AND DECREED that the judgment rendered by this Court on the 9th day of January, 1975 be and it is hereby reinstated and it is further

ORDERED, ADJUDGED AND DECREED that the judgment of this Court, as reinstated, be and it is hereby amended at the foot as follows:

> ADJUDGED AND DECREED that the 1974 County Charter, Local Law No. 2 of Niagara County for 1974, which supersedes the 1972 County Charter, Local Law No. 1 of Niagara County for 1972, is in full force and effect as the instrument defining the form of local government for Niagara County.

and it is further

ORDERED that pursuant to 28 USC § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the action in the Supreme Court of the State of New York entitled, "In the Matter of Town of Lockport, New York and one vs. Mario M. Cuomo, Secretary of State of the State of New York *et al.* for judgment under CPLR Article 78", and it is further

ORDERED that the motion of the plaintiffs-appellees to grant an amendment to the plaintiffs' complaint to include the 1974 Charter be and it is hereby denied.

s/ WILLIAM H. TIMBERS, *USCJ*
WILLIAM H. TIMBERS
United States Circuit Judge

s/ HAROLD P. BURKE, *USDJ*
HAROLD P. BURKE
United States District Judge

s/ JOHN T. CURTIN, *USDJ*
JOHN T. CURTIN
United States District Judge

Dated: December 10, 1975.

APPENDIX 3

Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants,

and

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants.

Civil Action
No. 1973-222

Notice is hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the judgment

entered in this action on December 15, 1975 in the United States District Court for the Western District of New York reinstating, modifying and amending the judgment of said District Court entered on January 9, 1975 which declared Article IX, Section 1(h)(1), of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35c McKinney's Consolidated Laws of New York, Section 33 (7)] unconstitutional as being in violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution; declaring a proposed Charter for Niagara County to be duly adopted; enjoining and directing the above-named Defendants to file and implement the Niagara County Charter set forth in Local Law No. 2 of 1974 for Niagara County; holding the action to be not moot; and enjoining the Intervening Defendants from proceeding with an action pending in the Supreme Court of the State of New York to restrain the implementation of proposed Local Law No. 2 of 1974. An appeal to this Court from the judgment entered on January 9, 1975 is pending under Docket No. 74-1390.

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

Dated: Buffalo, New York, December 18, 1975.

s/ VICTOR T. FUZAK
VICTOR T. FUZAK, ESQ., for

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Office and Post Office Address
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: (716) 856-4000

and

ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON

Attorneys for Intervening Defendants

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., *et al.*,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants,

and

THE TOWN OF LOCKPORT, NEW YORK, *et al.*,
Intervening Defendants.

Civil Action No. 1973-222.

State of New York, }
County of Erie. } ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 9330 Tonawanda Creek Road, Clarence Center, New York.

That on the 18th day of December, 1975 deponent served the annexed Notice of Appeal to the Supreme Court of the United States on John J. Phelan, Esq., attorney(s) for Plaintiffs in this action at 2300 Erie County Savings Bank

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

Building, Buffalo, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

SUSAN K. WATERS
The name signed must be printed beneath
SUSAN K. WATERS

Sworn to before me
this 18th day of December, 1975.
Linda L. Zienciowski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., *et al.*,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants,

and

THE TOWN OF LOCKPORT, NEW YORK, *et al.*,
Intervening Defendants.

Civil Action No. 1973-222.

State of New York, }
County of Erie. } ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 9330 Tonawanda Creek Road, Clarence Center, New York.

That on the 18th day of December, 1975 deponent served the annexed Notice of Appeal to the Supreme Court of the United States on Michael G. Wolfgang, Esq., attorney(s) for State of New York Defendants in this action at 65

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

Court Street, Buffalo, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

SUSAN K. WATERS
The name signed must be printed beneath
SUSAN K. WATERS

Sworn to before me
this 18th day of December, 1975.
Linda L. Zienciowski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., *et al.*,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants,

and

THE TOWN OF LOCKPORT, NEW YORK, *et al.*,
Intervening Defendants.

Civil Action No. 1973-222.

State of New York, }
County of Erie. } ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 9330 Tonawanda Creek Road, Clarence Center, New York.

That on the 18th day of December, 1975 deponent served the annexed Notice of Appeal to the Supreme Court of the United States on Miles A. Lance, Esq., attorney(s) for Niagara County Defendants in this action at Niagara

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

County Attorney's Office, Lockport, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

SUSAN K. WATERS
The name signed must be printed beneath
SUSAN K. WATERS

Sworn to before me
this 18th day of December, 1975.
Linda L. Zienciowski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, AND FLOYD SNYDER, INDIVIDUALLY AND AS SUPERVISOR OF THE TOWN OF LOCKPORT,

Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. AND FRANCIS W. SHEDD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees,

AND

JOHN J. GHEZZI, SECRETARY OF STATE OF THE STATE OF NEW YORK, ARTHUR LEVITT, COMPTROLLER OF THE STATE OF NEW YORK, LaVERNE S. GRAF, CLERK OF THE COUNTY LEGISLATURE, COUNTY OF NIAGARA, NEW YORK AND KENNETH COMERFORD, COUNTY CLERK, COUNTY OF NIAGARA, NEW YORK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

FILED FEBRUARY 17, 1976
PROBABLE JURISDICTION NOTED JUNE 7, 1976

INDEX.

Relevant Docket Entries.

UNITED STATES DISTRICT COURT

Western District of New York

May 4, 1973, Filed complaint.

May 25, 1973, Filed Answer for defts., Graf & Comerford.

May 31, 1973, Filed Stipulation extending for 20 days time to answer of defts. Lomenzo & Levitt.

June 8, 1973, Filed Summons & Mar. ret. on S&C served 5-8-73 on LaVerne Graff; on Arthur Levitt; no service on Lomenzo.

June 14, 1973, Filed Deft's Notice to motion to dismiss ret. 6-21-73; adj 6-28-73; 7-12-73; by consent to 8-13-73.

July 9, 1973, Filed Pltf's motion to strike defense ret. 7-12-73; by consent to 8-13-73.

Aug. 3, 1973, Filed Pltfs. motion to amend complaint ret. 8-6-73.

Aug. 6, 1973, Filed Pltfs. affidavit.

Oct. 29, 1973, Filed order granting motion of 8-2-73 & that Citizens for Action at the Local Level, Inc. is added as 1st Pty. Pltf & complaint is hereby amended in accordance with the proposed amended complaint & the amended complaint by service upon attys of record for the Deft. together with a copy of Order within 10 days from entry-Henderson, DJ Notice & copies to Samuel Tavano, Michael Wolfgang & Moot, Sprague, Marcy, Landy, Fernbach & Smythe.

Apr. 24, 1974, Filed order requesting Hon. Chief Judge of U.S. Ct. of Appeals to convene a 3-judge court-Curtin, DJ Notice & copies to John J. Phelan, Louis J. Lefkowitz & Miles A. Lance.

May 28, 1974, Filed Pltfs. notice of motion for summary judgment ret. 6-20-74.

Relevant Docket Entries.

May 30, 1974, Filed Pltfs. notice of motion to require admissions ret. 6-10-74.

June 6, 1974, Filed Defts., John J. Ghezzi & Arthur Levitt answer & motion for summary judgment.

June 7, 1974, Filed Defts. Ghezzi & Levitt, answer to requested admissions.

June 10, 1974, Motion by Pltf. for order requiring defts. to admit facts adj. to 6-12-74 at 9:00 a.m.

June 14, 1974, Filed Defts. Comerford & Graf answering affidavit.

June 20, 1974, Oral argument on motion by pltf. to declare unconstitutional Sec. 33(7) of the Municipal Home Rule Law of the State of N.Y. etc. Decision reserved.

Nov. 21, 1974, Filed Pltfs. review of the memorandum decision of this Ct. in the prior action & the reasons why the principle of collateral estoppel should not be applied to defeat the claim of the aggrieved voters of Niagara County, the class action pltfs. now before this court.

Nov. 22, 1974, Filed order of 3-Judge Ct. granting pltfs. summary judgment & denying defts. motion for summary judgment etc.—Timbers, Burke, & Curtin, Judges Notice & copies to John J. Phelan, Michael Wolfgang & Miles A. Lance.

Dec. 9, 1974, Settle judgment adj. to 12-23-74 for briefs. Submitted.

Jan. 9, 1975, Filed Declaratory Judgement and Injunction, granting Pltfs' motion for summary judgment, denying defts' motion for summary judgment, declaring unconstitutional certain sections of New York State Constitution and Municipal Home Rule of the State of New York, and direct-

Relevant Docket Entries.

ing Defts. to file and implement Niagara County charter set forth in Local Law No. 1 of 1972 for Niag. Co.—Timbers, Cj Burke, DJ and Curtin, DJ Notice & copies to Miles A. Lance, and Michael G. Wolfgang.

Feb. 27, 1975, Filed order to show cause for intervention of Town of Lockport & Floyd Snyder etc. as parties deft. for the purpose of prosecuting an appeal etc. ret. 3-3-75—Curtin, DJ.

Mar. 3, 1975, Motion by Twn. of Lockport to intervene in the appeal. Submitted.

Mar. 5, 1975, Filed Petrs. memorandum in support of intervention.

Mar. 5, 1975, Filed Pltfs. Francis W. Shedd affidavit.

Mar. 5, 1975, Filed order allowing applicants to intervene in this action & denying the application made at the oral argument on 3-3-75 for stay of the judgment previously entered etc.—Curtin, DJ Notice & copies to Francis W. Shedd, Louis J. Lefkowitz, Samuel L. Tavano, Hodgson, Russ, Andrews, etc.

Mar. 6, 1975, Filed Intervening Defts'. Notice of Appeal to the Supreme Court.

Mar. 6, 1975, Filed Intervening Defts'. affidavit of service of notice of appeal.

Mar. 23, 1975, Filed Petrs., Twn. of Huntington & Kenneth C. Butterfield, motion to intervene as party defts etc. ret. 4-28-75. Motion denied.

May 2, 1975, Filed decision & order denying the motion of the Twn. of Huntington & its Supervisor for intervention, etc.—Curtin, DJ Notice & copies to Messrs. Phelan, Lefkowitz, Tavano, Fuzak & Corso.

Relevant Docket Entries.

May 2, 1975, Original papers, docket entries and Clerk's certificate mailed to Clerk, U.S. Supreme Court pursuant to request of Victor T. Fuzak, Esq.

May 14, 1975, Filed Intervening deft., Twn. of Lockport motion for stay of enforcement of judgement ret. 5-19-75 Ct. to file order.

May 16, 1975, Filed affidavit of Samuel L. Tavano, Cty. Atty. for Lockport in opposition to motion for the stay of enforcement of judgment.

May 21, 1975, Filed letter to Judges, Timbers, Burke & Curtin dated 5-20-75 from John J. Phelan regarding the position of the pltfs. in this action.

May 22, 1975, Filed decision & order denying the intervening deft., Twn. of Lockport motion for stay. Under the circumstances, it appears that it would be more appropriate for the application to be made to a Justice of the Supreme Ct.—Curtin, DJ Notice & copies to John J. Phelan, Louis J. Lefkowitz, Samuel Tavano & Victor Fuzak.

May 22, 1975, Filed Intervening Deft. affidavit in reply.

May 23, 1975, Filed Intervening deft. notice of motion to vacate judgment ret. 5-27-75.

May 23, 1975, Filed Intervening defts. memorandum of law in support of motion to vacate judgment.

May 27, 1975, Oral argument on motion to vacate judgment. adj. to 6-2-75 Submitted.

May 29, 1975, Filed Defts., Laverne Graf & Kenneth Comerford answering affidavit to pltfs.-intervenor's motion to vacate judgment of 1-9-75.

May 30, 1975, Filed Intervening Deft-Appellants supplemental affidavit.

Relevant Docket Entries.

June 2, 1975, Filed affidavit of Pltf. Francis W. Shedd.

June 11, 1975, Filed order denying intervenor defts. motion to vacate the judgment of 1-9-75—Curtin, DJ Notice & copies to John J. Phelan, Louis J. Lefkowitz, Samuel Tavano & Victor Fuzak.

July 25, 1975, Filed transcript of proceedings of 5-19-75 & 6-2-75.

Sept. 2, 1975, Filed Pltfs. notice of motion for further injunctive relief etc. ret. 9-8-75.

Sept. 2, 1975, Filed Pltfs. notice of motion for an order & judgment is hereby re-noticed for 9-8-75.

Sept. 8, 1975, Pltfs. motion for an order & judgment in furtherance of the judgment of 1-9-75. Submitted.

Sept. 19, 1975, Filed letter to Judges Curtin, Burke & Timbers dated 9-12-75 from John Phelan.

Oct. 8, 1975, Oral argument on the question of mootness of the issues.

Oct. 8, 1975, Filed Pltfs. Notice of Motion to amend the amended complaint ret. 10/8/75.

Oct. 23, 1975, Filed Decision & Order of 3-Judge Ct. denying Pltfs'. motion to amend complaint, reinstating the judgment of this court of 1-9-75, amending the 1-9-75 judgment so that the 1974 Charter is in force and enjoining Intervening-Defts. from proceeding in the state court action-Timbers, CJ, Burke & Curtin, DJ (notice & copy to Moot, Sprague, Marcy, Landy & Fernbach, Messrs. Lefkowitz (Bflo.) and Tavano, and Hodgson, Russ, Andrews, Woods & Goodyear)

Nov. 6, 1975, Filed certified copy of Judgment of U.S. Supreme Court vacating judgment of District Court and re-

manding for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974.

Dec. 15, 1975, Filed Judgment reinstating judgment filed 1-9-75 & amending same to read that the 1974 County Charter, which supersedes the 1972 Charter, is in full force and effect; Town of Lockport is enjoined form proceeding further in a related action in state court and plaintiffs' motion to amend complaint is denied—Timbers, CJ, Burke & Curtin, DJ (notice & copy to Moot, Sprague, Marcy, Landy, Fernbach & Smythe, Messrs. Lefkowitz (Bflo) & Tavano and Hodgson, Russ, Andrews, Woods & Goodyear)

Dec. 18, 1975, Filed Intervening Defts'. Notice of Appeal to the Supreme Court.

Dec. 18, 1975, Filed Intervening Defts'. Affidavit of Service of notice of appeal on Plaintiffs.

Dec. 18, 1975, Filed Intervening Defts'. Affidavit of Service of notice of appeal on State of New York defendants.

Dec. 18, 1975, Filed Intervening Defts'. Affidavit of Service of notice of appeal on Niagara County defendants.

Dec. 22, 1975, Original papers filed subsequent to 5-2-75, exhibits, docket entries and Clerk's certificate mailed to Clerk, U.S. Supreme Court pursuant to request of Victor T. Fuzak, Esq. (papers transmitted for previous appeal still in Sup. Ct.)

Original Complaint (May 7, 1973).

UNITED STATES DISTRICT COURT

Western District of New York

Francis W. Shedd, Individually and on Behalf of All Others Similarly situated,

Plaintiffs,

vs.

John P. Lomenzo, the Secretary of State of the State of New York,

Arthur Levitt, Comptroller of the State of New York,

LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York,

Kenneth Comerford, County Clerk, County of Niagara, New York,

Defendants.

I

This is a civil action for a declaratory judgment and for injunctive relief authorized by Title 42, U.S.C., § 1983, 1988 to be commenced by a citizen of the United States or any other person within the jurisdiction thereof to redress the deprivation under color of law of rights, privileges and immunities secured by the Constitution and Laws of the United States. The rights, privileges and immunities sought to be redressed herein are those secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., § 1343(3).

II

The action is for a declaratory judgment that a referendum held in the County of Niagara in the State of New York on November 7, 1972, upon the proposition (No. 5 on the ballot), to wit, "Shall Local law No. 1 of 1972 providing for a change in the present form of county government to a charter form of government be approved?", an abstract of which proposed charter is annexed to the within complaint and designated Exhibit A, must accord each voter in the county the full benefit of his vote within the geographic area of the county as a single unit as a fundamental right of equal suffrage protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the County of Niagara being a local government unit which exercises general governmental powers throughout the geographic area of the county of substantially equal effect upon the entire population of the county.

And further for a declaratory judgment that proposition No. 5, a proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter (Exhibit A), which proposition was submitted to a vote of the electors of the entire geographic area of the County of Niagara, New York, in the general election in the year 1972, held on the 7th day of November, which proposition received 28,885 aye votes and 26,508 no votes in the entire geographic area of the County of Niagara by all qualified electors voting thereon, was duly adopted and entitled to force and effect in accordance with the rights, privileges and immunities secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

And further for a declaratory judgment that the provisions of Art. 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New

York, *35C McKinney's Cons. Laws of New York*, § *33(7)*, that no form of local government or amendment thereof shall become effective unless approved in a referendum by a majority of the votes cast thereon in the area of the county outside of cities and in the cities of the county, if any, considered as one unit is an unconstitutional dilution and debasement of the right of the plaintiff and all members of the class to equal representation pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

And for a further judgment enjoining and directing John P. Lomenzo, the Secretary of State of the State of New York; Kenneth Commerford, County Clerk of the County of Niagara, New York and LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York to accept and to file the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, pursuant to § 27 of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York*, § *27*, upon certification by the Clerk of the Niagara County Legislature that the aforesaid proposed county charter was approved by a majority of the total votes cast upon proposition No. 5 in the 1972 general election in the entire geographic area of Niagara County considered as one unit.

III

The plaintiff brings this action as a class action on behalf of the voters of the geographic area selected by the Niagara County Legislature which adopted proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, in which geographic area the referendum election was held as part of the general election in the year 1972 on November 7, thereof, whose vote is being diluted or debased by reason of the provisions of Article 9, § 1(h)(1) of the New

York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York*, § 33(7), which provide for two separate voting classes, to wit that no form of county government or amendment thereof, a local government unit exercising general governmental powers, shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and by a separate majority of the votes cast in the cities of the county, if any, considered as one unit. Members of the class on behalf of whom the plaintiff sues are so numerous that joinder of all members is impracticable and the questions of law or fact common to the class, the claims or defenses of the parties, are typical of the claims or defenses of the class. Further, the plaintiff has such a personal stake in the outcome of the controversy and has been so personally involved in the efforts of certain residents of the County of Niagara to bring about the adoption of a charter form of local government that his representation on behalf of all the aggrieved voters within the geographic area, to wit the voters whose vote was diluted or debased by the classification of two voting units requiring two separate majorities, will insure that concrete adverseness which sharpens the presentation of issues upon which the court depends for recognition of difficult constitutional questions and will insure that the interests of the entire class will be fairly and adequately protected. That further, the refusal of The Honorable John P. Lomenzo, the Secretary of State of the State of New York, to accept the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, which refusal prevents the proposed local law from becoming operative, constitutes action in opposition to the class as a whole and the grounds of his action are generally applicable to the class thereby making suitable final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

IV

The plaintiff at all times mentioned herein was a citizen of the United States and resided at 2620 Main Street in the City of Niagara Falls in the County of Niagara in the State of New York. That at all times mentioned herein he was a taxpayer of the United States of America, the State of New York, the County of Niagara and the City of Niagara Falls, That at all times mentioned herein he was a duly enrolled voter in the 3rd Election District of the 3rd Legislative District of the County of Niagara and did cast a vote from said election district of said legislative district in favor of proposition No. 5, a proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, on the 7th day of November, 1972.

V

The defendants in the within action are John P. Lomenzo, the Secretary of State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk of the County of Niagara, New York, in whose offices the proposed local law must be filed pursuant to § 27 of the Municipal Home Rule Law of the State of New York in order to become operative. On December 8, 1972, the Secretary of State declined to accept the proposed Local Law No. 1 for filing by reason of the fact that the forwarding officer, to with the Clerk of the Niagara County Legislature, had failed to certify that said proposed local law had been approved pursuant to § 33(7) of the Municipal Home Rule Law of the State of New York which provided that said proposed local law should not become operative unless and until it had received a majority of the votes in the area of the county outside the cities of said county and a

separate majority in the area of the cities of said county considered as a separate unit.

VI

That in the aforesaid referendum election to determine whether or not a charter of local government, to be known as the Niagara County Charter, should be the governing instrument for the people of the geograhic area, to wit Niagara County, and whether or not pursuant thereto the people of the geographic area of Niagara County should have the right to elect a Niagara County Executive and a Niagara County Comptroller, the votes cast in favor of such proposition totalled 28,885 and the votes cast in opposition to such proposition totalled 26,508. That for the purpose of clarity at this point, the votes cast in favor of the proposed local law in the following geographic area were as follows: within the three cities located within Niagara County—18,220; and in the areas outside of the cities of Niagara County—10,665 for a total of 28,885. That the votes cast in opposition to the proposed local law in the following areas were: within the three cities located within Niagara County—14,915; and in the areas outside of the cities of Niagara County—11,594 for a total of 26,508.

VII

That the proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter, was adopted by the Niagara County Legislature on September 6, 1972 and submitted to referendum pursuant to Art. 9, § 1(h)(1) of the New York State Constitution. That said Niagara County Charter (Exhibit A, abstract) was proposed as the governing instrument for a unit of local government, the County of Niagara, having general governmental powers over the entire

geographic area in which no specific group of voters, residents or other persons were primarily affected or interested as compared to another group. Within the geographic boundaries of said unit of local government having general governmental powers, there was contained 3 cities, 5 villages and 12 townships. The general governmental powers and the general responsibility for local government property and affairs to be carried out by the unit of local government, to be adopted in the proposed county charter and by the terms of the county law and relevant applicable statutes, were, among others, to set a tax rate, to equalize assessments, to issue bonds, to prepare a budget for the county's needs and to make long term judgments about the way Niagara County should develop—whether industry should be solicited, roads improved, recreation facilities built. The functions to have been performed by said county government pursuant to the proposed Niagara County Charter were to have affected all the residents of Niagara County uniformally and equally. The proposed county charter government, through the county executive and the county comptroller to have been elected pursuant thereto (See Exhibit A attached), contained authority to make substantial numbers of decisions affecting all citizens, whether they reside inside the limits of the three cities of Niagara County or in the areas outside of the cities within Niagara County. The county charter government would have maintained buildings, administered welfare services, enforced environmetal laws, maintained and improved roads, provided health care and drainage and refuse disposal, mental health services and county planning. Real property taxes were to be levied and equalized upon real property in the county. The operating and capital budget expenditures were assessed uniformly upon all the taxpayers of the entire geographic unit. By the terms of the proposed county charter, no function, facility, duty or power of any city, town, village

or district is transferred, altered or impaired. Finally, by the terms of said charter the terms of office of the members of the Niagara County Legislature were extended to four year terms.

VIII

The provisions of Article 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York*, § 33(7), which require that (1) no charter or other alternative form of county government or (2) any such form of county government that transfers functions of the cities, towns, villages, districts or other units of government, including the county, to each other or (3) any such form of county government that abolishes one or more offices, departments, agencies or units of government may become effective unless approved on a referendum by a majority of the votes cast in the cities of the county voting as a unit and in the area outside the cities of the county voting as a separate unit is an unconstitutional deprivation of the right of this plaintiff and other members of the class to the equal protection of the law pursuant to the Fourteenth Amendment in that it violates the principle of equal representation for equal numbers of people without regard to race, sex, economic status or place of residence within the state.

IX

The provisions of Art. 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York, § 33(7)*, which create classifications of voters in each of the counties of the State of New York without any rational justification thereof, without any articulated and permissible state goal and limit the voting franchise of the plaintiff and

other members of the class without defining the interests promoted or demonstrating a compelling state interest, constitute a *prima facie* unconstitutional dilution or debasement of the vote of the plaintiff and members of the class based upon the *prima facie* classification in units of voters by reason of their residence in the cities of the County or in the area outside of the cities of the county. A chart of the population of New York State located within the cities of each county and in the area outside of the cities is annexed to the within complaint and designated Exhibit B. Said Exhibit B demonstrates graphically that the classification in the New York State Constitution of voters based upon their residence within the cities or in the area outside of the cities create unequal population voting units but not consistently in favor of city residents or non-city residents but rather creates unconstitutional voting power in favor of resistance to change, in favor of historical rigidity and in furtherance of suspect classification based upon race, sex, economic status and location of residence within the state. The classification deprives this plaintiff and others similarly situated of their constitutional right of equal representation in the determination of forms of local government of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature as a result of the change of the form of said unit of general purpose local government.

X

Such deprivation of the rights, priviliges and immunities secured by the Constitution of the United States are causing the plaintiff and members of his class serious and irreparable injury and harm for which there is no plain, adequate or com-

plete remedy to redress such wrongs other than a suit for a declaratory judgment and injunctive relief.

XI

The application for a declaratory judgment and for injunctive relief herein restraining the enforcement, operation and execution of Art. 9, § 1(h)(1) of the New York State Constitution insofar as it provides for separate majorities of voters residing in the cities of a county and in the area outside the cities of a county upon a referendum election to establish a county charter government, a form of general purpose local government and restraining the enforcement, operation and execution of § 33(7) of the Municipal Home Rule Law of the State of New York *35C McKinney's Cons. Laws of New York, § 33(7),* on the ground that such constitutional and statutory provisions violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution may not be granted unless it is heard and determined by a district court of three judges pursuant to Title 28, U.S.C. §§ 2281, 2284. The plaintiff does respectfully request that such a three-judge district court be convened in accordance therewith.

XII

The venue pursuant to Title 28, U.S.C., § 1391(b) is based upon the fact that this is a civil action in which the claim, to wit the denial of the fundamental right to equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment, arose in the judicial district within which the action is commenced.

WHEREFORE, the plaintiff respectfully prays on his own behalf and on behalf of all members of the class that judgment be granted in favor of the plaintiff in this action by a district court consisting of three judges pursuant to Title 28, U.S.C., §§ 2281, 2284,

(a) declaring that in the referendum held in the County of Niagara in the 1972 general election on the 7th day of November, 1972, upon proposition No. 5, to wit "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of county government be approved?", in which referendum proposition No. 5 received 28,885 votes in favor thereof and 26,508 votes in opposition thereto in the total geographic area of Niagara County as one voting unit, proposition No. 5 was duly adopted pursuant to the provisions of the Equal Protection Clause of the Fourteenth Amendment and is entitled to force and effect as the form of local government for the County of Niagara in accordance with the terms thereof; and

(b) declaring that the provisions of the New York State Constitution, Art. 9, § 1(h)(1) thereof and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York, § 33(7),* which require that the adoption or amendment of (1) a charter form or other alternative form of county government or (2) any such form of county government which transfers one or more functions or duties of the county or of the cities, towns, villages, districts or other units of local government wholly contained in such county to each other or (3) any such form of county government which abolishes offices, departments agencies or units of government shall not become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of the cities and in the cities of the county, if any, considered as one unit, violate the Equal Protection Clause of the Fourteenth Amendment; and

(c) declaring that the alternative forms of county government provided by Art. 9, § 1(h)(1) of the New York State Constitution and by Article 4 of the Municipal Home Rule Law of

the State of New York entitled, "The County Charter Law," *35C McKinney's Cons. Laws of New York, §§ 30-35,* are forms of local government which provide general governmental services over an entire geographic area and in which no particular class of the population is specially interested or affected so as to warrant the exclusion of other persons from equal suffrage and, therefore, the approval or amendment of such alternative forms of county government on a referendum must be conducted in a single voting unit in order to accomplish the equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment; and

(d) enjoining and directing the defendants to accept proposition No. 5, the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, and to file the same in their respective offices upon due service of a certified copy of an order of this court to said effect; and

(e) directing that the election of a Niagara County Executive and a Niagara County Comptroller as provided in proposition No. 5 be held at the earliest available opportunity at a general election or a special election called therefor, upon the granting and entry of a final order and judgment in favor of the plaintiff in the within action, with the terms and conditions of such election to be settled at the time of the granting and entry of an order adjudging and determining the rights, privileges and immunities of the plaintiff and the members of the class as asserted in the within action to be secured by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

(f) awarding the plaintiff such further and different relief as may seem appropriate from the pleadings and proceedings in this action and which the court may deem just and proper and further awarding the plaintiff such costs, fees and disbursements as may be deemed appropriate for the prosecution of the within action.

MOOT, SPRAGUE, MARCY,
LANDY, FERNBACH &
SMYTHE,
Attorneys for the Plaintiff.

Exhibit A to Original Complaint (Abstract of 1972 Proposed Charter).

NIAGARA COUNTY

ABSTRACT OF PROPOSED CHARTER
FOR NIAGARA COUNTY

FORM OF SUBMISSION OF PROPOSED CHARTER

NIAGARA COUNTY SEAL

Adopted September 6, 1972, by the Niagara County Legislature subject to approval by Referendum November 7, 1972.

ARTICLE I—NIAGARA COUNTY AND ITS GOVERNMENT

Charter constitutes form of government for Niagara County. Purposes include "The separation of county legislative and executive functions; the securing of all possible county home rule; and the accomplishment of greater efficiency and responsibility in county government."

Within limits prescribed by the County Law, Charter supercedes inconsistent provisions of other laws.

ARTICLE II—LEGISLATIVE BRANCH

County Legislature continues as "the legislative, appropriating, governing and policy determining body of the county" with no change in numbers. The term of office of the members shall be four years. Local laws and ordinances are subject to veto by the County Executive; veto may be overriden by ⅔ vote.

Sums of money appropriated by any one or more items, or parts of items, or parts of items in any law or resolution appropriating money for the use of the county government or any agency or commission, are subject to veto by the County Executive; veto may be overridden by a majority vote.

ARTICLE III—EXECUTIVE BRANCH

There shall be a County Executive who shall be elected from the County at large, and who shall at all times be a qualified elector of the County. He shall hold no other public office except as otherwise herein provided; shall give his whole time to the duties of the office, and shall receive therefor a compensation as fixed by the County Legislature. His term of office shall begin with the first day of January, 1974, next following his election and shall be for four years. County Executive is chief executive and administrative head of county government. Provision is made for removal and designation of Acting County Executive. In the office of County Executive, there are six divisions: Budget, Purchase, Central Services, Research, Traffic Safety and Advisory Board, and Recreation and Related Programs, appointment of these Executive Division heads is also subject to confirmation.

ARTICLE IV—DEPARTMENT OF AUDIT AND CONTROL

There shall be a department of audit and control headed by a comptroller who shall be elected from the county at large. His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1973 at which a comptroller shall be elected for a four year term to commence January 1, 1974, and every comptroller elected thereafter shall have a term of four years. At the time of his election and throughout his term of office he shall be a qualified elector of the county, shall devote his whole time to the duties of his office, and shall hold no other public office.

The Comptroller shall have all the powers and perform all the duties conferred or imposed upon a county comptroller under the county law.

ARTICLE V—DEPARTMENT OF FINANCE

Commencing the first day of January, 1974, there shall be a department of finance headed by a commissioner. He shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office, by the County Executive subject to confirmation by the County Legislature and shall serve at the pleasure of the County Executive. The elective office of county treasurer shall be abolished as of January 1, 1974.

ARTICLE VI—DEPARTMENT OF ASSESSMENT

There shall be a department of assessment, the head of which shall be the director of real property tax services, who shall be appointed on the basis of his qualifications for the

duties of the office. Such director shall be appointed by the County Executive, subject to confirmation by the County Legislature for a six year term.

ARTICLE VII—FINANCIAL PROCEDURES

The County Executive shall submit to the clerk of the county legislature, on or before the 5th day of October of each year, for consideration by such legislature, a proposed budget for the ensuing fiscal year, and a capital program for the next six fiscal years.

ARTICLE VIII—DEPARTMENT OF PUBLIC WORKS

There shall be a department of public works, the head of which shall be the commissioner of public works, who shall be appointed on the basis of his experience and qualifications for the duties of the office. Such commissioner shall be appointed by and serve at the pleasure of the County Executive, subject to confirmation of the County Legislature. Upon the effective date of this charter, the county department of highways, the parks department and the department of engineering, if any, shall be divisions of the department of public works.

ARTICLE IX—BOARD OF ACQUISITION AND CONTRACT

There shall be a board of acquisition and contract which shall consist of the County Executive, Commissioner of Public works, and the Chairman of the County Legislature. The Board of Acquisition and Contract shall contract for and acquire by purchase or condemnation, all lands, buildings and other real property, the acquisition of which has been authorized by the County Legislature, and shall award all contracts for the construction, reconstruction, repair or alterations of all public works or improvements.

ARTICLE X—PUBLIC DEFENDER

There shall be a Public Defender who shall be appointed by the County Legislature and whose term of office shall be for four years. He shall be duly admitted to the practice of law in the State of New York and a resident of the County of Niagara.

ARTICLE XI—DEPARTMENT OF SOCIAL SERVICES

There shall be a department of social services headed by a commissioner who shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office by the County Executive, subject to confirmation by the County Legislature, except that the person serving as commissioner of public welfare at the time immediately prior to this charter taking effect, shall continue to serve as the Commissioner of the Department of Social Services until December 31, 1976, and thereafter the commissioner of the Department of Social Services shall be appointed as provided pursuant to Section 116 of the Social Welfare Law of the State of New York.

ARTICLE XII—DEPARTMENT OF HEALTH

There shall continue to be a department of health headed by a commissioner of health who shall be appointed by the Health Board. The Commissioner of health shall be a physical duly licensed to practice medicine in the State of New York, shall be experienced in public health administration and shall possess such qualifications as are prescribed in the state sanitary code or otherwise by the public health council of the State of New York.

ARTICLE XIII—DEPARTMENT OF MENTAL HEALTH

There shall continue to be a department of mental health headed by a director who shall be appointed by the Mental Health Board, qualified according to the standards fixed by the State Commissioner of Mental Hygiene, in accordance with the provisions of Article 8(a) of the Mental Hygiene Law.

ARTICLE XIV—DEPARTMENT OF ECONOMIC DEVELOPMENT & PLANNING

There shall continue to be a Niagara County Planning Board as provided by Article 12(b) of the General Municipal Law and shall be known as the Niagara County Planning Board, members of which shall be appointed by the Chairman of the County Legislature.

ARTICLE XV—DEPARTMENT OF PERSONNEL

The Niagara County Civil Service Commission is continued for the purpose of administering Civil Service Law for Niagara County. There shall be a department of personnel headed by a director who shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office by the County Executive subject to confirmation by the County Legislature.

ARTICLE XVI—DEPARTMENT OF LAW

There shall be a department of law headed by the County Attorney, who shall be appointed by, and whose term shall be the same as the County Legislature. He shall be duly admitted to the practice of law in the State of New York and a resident of the County of Niagara.

ARTICLE XVII—DEPARTMENT OF RECORDS

There shall be a department of records headed by a County Clerk who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1973, at which a county clerk shall be elected for a three year term to commence on January 1, 1974, and every county clerk elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

ARTICLE XVIII—DISTRICT ATTORNEY

There shall be a district attorney who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1972, at which a district attorney shall be elected for a three year term to commence on January 1, 1973, and every district attorney elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, and duly admitted to the practice of law in the State of New York. He shall devote his whole time to the duties of his office and shall hold no other public office.

ARTICLE XIX—SHERIFF

There shall be a sheriff who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his

election, except that the provisions of this section with respect to such election shall not take effect until the general election of 1973, at which a sheriff shall be elected for a three year term to commence on January 1, 1974, and every sheriff elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

ARTICLE XX—MEDICAL EXAMINER

The County Legislature shall have the power by local law, to abolish the office of coroner and create the office of appointive medical examiner. Such local law shall not be subject to mandatory referendum, but must be adopted and filed in the office of the Secretary of the State of New York at least 150 days prior to any general election. The terms of office of all coroners elected or appointed and holding office in the county at the time such local law is adopted and filed as hereinbefore provided, shall expire on the December 31st following the adoption of such local law, and at the general election to be held in such year and thereafter no coroner shall be elected and Article XX of this charter and applicable provisions of the code shall become and be effective on and after January 1, next succeeding.

ARTICLE XXI—OTHER COUNTY BOARDS, OFFICES, INSTITUTIONS AND FUNCTIONS

The Board of Elections, its powers and duties and the method of appointment of the members thereof by the County Legislature shall continue as provided by law. There shall be an office of probation headed by a probation director who shall be appointed in the manner provided by Section 938-b of the Code of Criminal Procedure of the State of New York, and shall have such powers and duties as are provided by law.

The Board of Managers of Mount View Hospital, its powers and duties and the method of appointment of the members thereof shall continue as provided by law. The board of trustees of the Niagara County Community College, the Alcoholic Beverage Control Board, the Fire Advisory Board, and the Industrial Development Agency shall continue as provided by law. The appointment of any head, board or agency in relation to a county sewer, water, drainage or watershed protection district, if any, or to any other county district of a similar nature, shall be by the County Legislature. The Fire Coordinator shall be appointed by the County Legislature upon recommendation of the Fire Advisory Board. Subject to confirmation by the County Legislature, and except as otherwise provided in this charter and code, the County Executive shall appoint the head of any other or additional administrative unit of the county including among others, the director of civil defense, director of veteran's service, county historian, sealer of weights and measures. Except as otherwise provided in this charter or code, other appointments to boards and like units shall be made by the county executive subject to confirmation of the county legislature. The administrator of the Workmen's Compensation however, shall continue to be appointed as now provided by local law and the laws of the State of New York applicable thereto. Administrative functions not otherwise assigned by this charter or code shall be assigned by the county executive to an administrative unit.

ARTICLE XXII—SERVICE RELATIONSHIPS

No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code. The County of Niagara shall have power to contract with any public corporation including but not limited to a

municipal, district or public benefit corporation as defined in Section 3 of the General Corporation Law or with any public authority or combination of the same for the establishment, maintenance and operation of any facility and the rendering of any service which each of the contracting parties would have legal authority to establish, maintain, operate or render for itself. The costs and expenses incurred as well as charges for central facilities and administrative services relating thereto shall be borne proportionately by each such contracting party as agreed upon.

ARTICLE XXIII—GENERAL PROVISIONS

The board of trustees of the Niagara County Community College shall have such powers and only such powers as those specified in the Education Law of the State of New York. Except as otherwise provided in this charter or code, every other board, the members of which are appointed, shall be an advisory board consisting of such members, and the members thereof shall be appointed for such terms as are or may be provided in this charter or the code. Wherever provision is made in this charter or code for the appointment of an advisory board, the members so appointed, unless otherwise provided, shall serve at the pleasure of the appointing authority. Except as otherwise provided in this charter or code, every contract to which the county is a party shall require approval by the County Legislature, if said contract is for (a) the sale or purchase of real property; (b) the erection, alteration or demolition of a building or other structure; (c) the providing of facilities or the rendering of services by, for or with any other public corporation. All such contracts shall be executed by the county executive, except as otherwise provided in this charter or the code. The civil service status and rights of county employees shall not be affected by this charter or code. A vacancy, otherwise than by expiration of

term in any elective county office including but not limited to the office of comptroller, county clerk, district attorney or sheriff shall be filled in accordance with Section 400 (7) of the County Law. The person so appointed shall hold office by virtue of such appointment until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election a comptroller, county clerk, district attorney or sheriff, as the case may be, shall be elected for the balance of the term, if any.

A vacancy, otherwise than by expiration of term in the office of County Executive, shall be filled by appointment by the County Legislature of a qualified elector of the county, having the same political affiliation as the person last elected to such office. The person so appointed shall hold office by virtue of such appointment until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which time a county executive shall be appointed for the balance of the unexpired term, if any. Except as otherwise provided in this charter or code, a vacancy in the office of the head of any administrative unit, the head of which by virtue of this charter the county executive shall have the power to appoint or remove, shall be filled by a person who shall be appointed on the basis of his adminstrative experience and his qualifications for the duties of such office by the county executive subject to confirmation by the county legislature where provided. Except as otherwise provided in this charter or code, the head of any administrative unit shall have the power to fill vacancies occurring within such administrative unit pursuant to the civil service law.

ARTICLE XXIV—APPLICATION OF CHARTER

This charter shall become and be effective on and after January 1, 1973, upon approval by public referendum in the manner provided by law. The administrative code may be adopted and amended by local law at any time subsequent to the approval and adoption of this charter. The first county executive shall be elected at the general election in 1973, and shall take office on January 1, 1974. The comptroller shall be first elected at the general election in 1973 and the person then elected shall, upon qualifying, take office on January 1, 1974 for a four year term, and every comptroller elected thereafter shall have a term of four years. Pending election and qualifying for office, the incumbent county treasurer, county clerk, district attorney and sheriff shall have the powers and perform the duties prescribed in this charter and code for the elective office of comptroller, county clerk, district attorney and sheriff respectively. The terms of office for the county executive and comptroller shall be for four years except as otherwise provided in this charter. The terms of office for the county clerk, district attorney and sheriff shall be three years except as otherwise provided in this charter. This charter may be amended in the manner provided by law. Except as otherwise provided in this charter, any local law which would create or abolish an elective county office, change an elective office to appointive or an appointive office to elective or change the powers of an elective county officer shall be subject to mandatory referendum. No local law which would abolish or change an administrative unit prescribed in this charter or the power of an appointive county officer in the executive branch shall be enacted before January 1, 1973.

Provision is made for continuity of authority (transition under Charter), continuing validity of prior obligations (bonds already issued, etc.), separability (in case of adjudication) and liberal construction to effectuate charter objectives and purposes.

Local Law No. 1 of 1972 adopted by the Niagara County Legislature on September 6, 1972. Abstract prepared by LaVerne S. Graf, Clerk of the Niagara County Legislature with advice of Samuel L. Tavano, County Attorney, pursuant to Section 33, subdivision 8 of the Municipal Home Rule Law, State of New York.

FORM OF PROPOSITION TO BE VOTED ON

Proposition for the adoption of a County Charter for the County of Niagara, State of New York, in accordance with the provisions of Article 4 of the Municipal Home Rule Law of the State of New York.

Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of county government BE APPROVED?

We hereby certify that the foregoing Text of the Proposed Niagara County Local Law, in relation to the adoption of a County Charter for the County of Niagara, State of New York, in accordance with the provisions of Article Four of the Municipal Home Rule Law, otherwise referred to as the County Charter Law of the State of New York, are correct copies of the originals on file with the Board of Elections.

Given under our Hand and Official Seal of the Office of the Board of Elections of the County of Niagara of the State of New York, at the City of Lockport, this eighth day of Sep-

tember, in the year One Thousand Nine Hundred and Seventy-two.

COUNTY OF NIAGARA,
BOARD OF ELECTIONS,
STATE OF NEW YORK.

PERRY CHAMBERS,
Commissioner.

NORTON F. AURIGEMA,
Commissioner.

Comprising the Board of Elections
of the County of Niagara, New York.

Exhibit B to Original Complaint (Population of Counties, 1970).

The population figures of the following chart are compiled from statistics contained in the New York Legislative Manual, 1971-72 entitled "Population of Counties According to the Enumerations of 1970," at Page 1255:

County	Population of the Cities as a Unit Within the Geographic Area of the County	Population of Area Outside the Cities Within the Geographic Area of the County	Total County	Percentage of Vote With Power to Prevent Approval of Proposition
Albany	146,838	139,904	286,742	24.39%
Allegany	None	46,548	46,548	(not applicable
Broome	64,123	157,692	221,815	14.45%
Cattaraugus	27,046	54,620	81,666	16.56%
Cayuga	34,599	42,840	77,439	22.34%
Chautauqua	56,650	90,655	147,305	19.22%
Chemung	39,945	61,592	101,537	19.67%
Chenango	8,843	37,525	46,368	09.53%
Clinton	18,715	54,219	72,934	12.83%
Columbia	8,940	42,579	51,519	08.67%
Cortland	19,621	26,273	45,894	21.37%
Delaware	None	44,718	44,718	(not applicable
Dutchess	45,284	177,011	222,295	10.18%
Erie	513,323	600,168	1,113,491	23.05%
Essex	None	34,631	34,631	(not applicable
Franklin	None	43,931	43,931	(not applicable

Exhibit B to Original Complaint (Population of Counties, 1970).

County	Population of the Cities as a Unit Within the Geographic Area of the County	Population of Area Outside the Cities Within the Geographic Area of the County	Total County	Percentage of Vote With Power to Prevent Approval of Proposition
Fulton	29,722	22,915	52,637	21.76%
Genesee	17,338	41,384	58,722	14.76%
Greene	None	33,136	33,136	(not applicable)
Hamilton	None	4,714	4,714	(not applicable)
Herkimer	7,629	60,004	67,633	05.64%
Jefferson	30,787	57,721	88,508	17.39%
Lewis	None	23,644	23,644	(not applicable)
Livingston	None	54,041	54,041	(not applicable)
Madison	11,658	51,206	62,864	09.27%
Monroe	295,011	416,906	711,917	20.71%
Montegomery	25,524	30,359	55,883	22.83%
Nassau	58,897	1,369,941	1,428,838	02.06%
Niagara	147,026	88,694	235,720	18.81%
Oneida	141,759	131,278	273,037	24.04%
Onondaga	197,297	275,538	472,835	20.86%
Ontario	27,281	51,568	78,849	17.30%
Orange	57,678	163,979	221,657	13.01%
Orleans	None	37,305	37,305	(not applicable)
Oswego	34,916	65,981	100,807	17.31%
Otsego	16,030	40,151	56,181	14.26%
Putnam	None	56,696	56,696	(not applicable)
Rensselaer	10,136	142,374	152,510	03.32%
Rockland	None	229,903	229,903	(not applicable)
St. Lawrence	14,554	97,437	111,991	06.49%

Exhibit B to Original Complaint (Population of Counties, 1970).

County	Population of the Cities as a Unit Within the Geographic Area of the County	Population of Area Outside the Cities Within the Geographic Area of the County	Total County	Percentage of Vote With Power to Prevent Approval of Proposition
Saratoga	25,092	96,672	121,764	10.30%
Schenectady	77,958	83,120	161,078	24.19%
Schoharie	None	24,750	24,750	(not applicable)
Schuyler	None	16,737	16,373	(not applicable)
Seneca	None	35,083	35,083	(not applicable)
Steuben	27,936	71,610	99,546	14.03%
Suffolk	None	1,127,030	1,127,030	(not applicable)
Sullivan	None	52,580	52,580	(not applicable)
Tioga	None	46,513	46,513	(not applicable
Tompkins	26,226	50,828	77,064	17.01%
Ulster	25,544	115,697	141,241	09.04%
Warren	17,222	32,180	49,402	17.43%
Washington	None	52,725	52,725	(not applicable
Wayne	None	79,404	79,404	(not applicable
Westchester	422,089	472,317	894,406	23.59%
Wyoming	None	37,688	37,688	(not applicable
Yates	None	19,831	19,831	(not applicable

Answer of Defendant Niagara County Officials to Original Complaint (May 25, 1973).

(Original Title.)

The Defendants, LaVerne S. Graf, and Kenneth Comerford, for their answer to the Plaintiff's complaint allege as follows:

1. Upon information and belief admits the allegations of Paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11.

2. Denies Paragraph 5.

3. Denies each and every allegation not heretofore admitted, denied, or otherwise controverted.

For an affirmative defense to the complaint of the plaintiff, defendant alleges as follows:

4. On the 3rd day of April, 1973, the Federal District Court of the Western District of New York entered a decision and judgment in an action between the County of Niagara and the State of New York in which the County of Niagara was Plaintiff and alleged the same constitutional claim as is raised by the plaintiffs in this action.

5. The Court's decision in that action was that there was no substantial Federal question presented by the County of Niagara claim. Attached hereto and made a part hereof, is the Decision and Judgment marked Exhibit "A".

6. As a result of this decision, the plaintiffs in this action are now barred and collaterally estopped from raising the same issue again against the same defendants or their agents, servants, or employees.

WHEREFORE, the defendants, LaVerne S. Graf, and Kenneth Comerford, request the Court to dismiss the action of the plaintiff on the grounds that no substantial Federal question exists, and for such other and further relief as the

Exhibit A Attached to Answer.
Plaintiffs' Notice of Motion to Strike Affirmative Defense of Collateral Estoppel (July 9, 1973).

Court may deem proper, together with the cost and disbursement of this action.

SAMUEL L. TAVANO,
Niagara County Attorney,
Attorney for Defendants, LaVerne S. Graf & Kenneth Commerford.

(Exhibit A to Answer, Henderson, D. J. Decision in *County of Niagara* v. *State of New York,* Civ. 1972—656 reproduced *infra* at pp. 178-182).

Plaintiffs' Notice of Motion to Strike Affirmative Defense of Collateral Estoppel (July 9, 1973).

(Original Title.)

PLEASE TAKE NOTICE that the undersigned will move this Court at a Term thereof to be held by the Honorable John T. Curtin, U.S.D.J., on the 12th day of July, 1973, at 10:00 A.M. on that date or as soon thereafter as counsel can be heard, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, for an order striking the affirmative defense of collateral estoppel pleaded in paragraphs numbered "4," "5" and "6" of the answer of the defendants, LaVerne S. Graf, Clerk of the County Legislature, Town of Niagara, and Kenneth Comerford, County Clerk, Town of Niagara, on the ground that said defense is insufficient as a matter of law and for such other and further relief as the court may deem just and proper in the premises.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH AND SMYTHE.

Affidavit in Support of Plaintiffs' Motion to Strike Affirmative Defense of Collateral Estoppel (August 3, 1973).

(Original Title.)

JOHN J. PHELAN, being duly sworn, deposes and says:

1. That he is an attorney at law, duly admitted to practice in the United States District Court for the Western District of New York and is counsel for the plaintiffs in the above-entitled action.

2. This affidavit is submitted to the court in opposition to the defense of collateral estoppel raised by the defendants. The defendants Lomenzo and Levitt raise the issue in a motion to dismiss the above-entitled action on the ground, among others, that the plaintiff is barred and collaterally estopped from raising the issues in the above-entitled action. The defendants Graf and Comerford raise the issue as an affirmative defense in their answer and an appropriate motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure has been made by the plaintiff Shedd to strike from the answer of the defendants Graf and Comerford paragraphs "4", "5" and "6" of their answer wherein is contained such affirmative defense, the affirmative defense of collateral estoppel.

3. The alleged basis for the defense of collateral estoppel is that the action entitled, *County of Niagara, New York vs. State of New York* in this court, which was finally dismissed on May 4, 1973, is a bar to this action.

4. In order for collateral estoppel to be a defense and a bar to a subsequent action, the subsequent action must be between the same parties or their privies.

The previous action, the action by the *County of Niagara* was not instituted as a class action pursuant to Rule 23 nor did such plaintiff have any of the qualities of adverseness to

sharpen the presentation of the issues nor the capacity or desire to represent the interests of the class of aggrieved voters, all of which your deponent will develop shortly. Under no circumstances, your deponent contends, could such action ever be considered a class action and therefore there is no sameness of party which would fulfill the first requirement of the defense of collateral estoppel.

5. A second question is whether or not there was any basis for a claim by any of these four defendants of privity between the plaintiff in this action and the plaintiff in the previous action in this court entitled *County of Niagara, New York vs. State of New York, i.e.* whether there is a factual evidence that in the previous action the plaintiff adequately represented or protected the interests of, or afforded due process to the voters of Niagara County who are aggrieved by the fact that their vote in favor of the proposition for the adoption of a Niagara County Charter was debased and diluted unconstitutionally. The factual record is to the contrary. On the one occasion in which the Niagara County Legislature was requested to act at the request of the plaintiff Francis W. Shedd, an aggrieved voter who spoke for the class of aggrieved voters, the Niagara County Legislature refused to represent such voters and rejected the request that the issue of the deprivation of their constitutional rights continue to be litigated.

6. The fact that the aforesaid aggrieved voters were not represented or given their day in court in the previous action is clearly demonstrated by the events that occurred on May 4, 1973 involving whether or not the Niagara County Legislature would authorize and direct the Niagara County Attorney to file a notice of appeal from the determination of this court in

the action entitled *County of Niagara, New York vs. State of New York* so that a true class action pursuant to Rule 23 could be joined with said action and the substantive constitutional issue adequately and properly presented.

7. In other words, the issue of whether or not the Niagara County Legislature and the Niagara County Attorney were willing and prepared to represent the aggrieved voters was presented to that body before the order dismissing the action entitled *County of Niagara, New York vs. State of New York* was final and upon information and belief the Niagara County Legislature rejected the request of the plaintiff in this action that a notice of appeal from the order of dismissal in the previous action be filed and served so that no claim could ever be made that the previous action commenced by the Niagara County Attorney was dispositive of the substantial federal constitutional questions raised in this action.

8. This affidavit is made by your deponent as attorney for the plaintiff Francis Shedd upon information and belief where stated because of the fact that the plaintiff Francis W. Shedd is out of the state and to the best of your deponent's knowledge is on the Pacific Coast and unavailable to execute an affidavit. Upon information and belief, at the recommendation of your deponent, the plaintiff Francis W. Shedd appeared before the Niagara County Legislature at a meeting thereof held on May 4, 1973, advised the Niagara County Legislature that he was a voter of the City of Niagara Falls, that he had voted in favor of the proposition for the adoption of the Niagara County Charter, that it was his contention that he was an aggrieved voter who had been deprived of his right of equal suffrage guaranteed by the Fourteenth Amendment of the United States Constitution, that he intended to com-

mence a class action for a declaratory judgment and a determination of whether his constitutional right to equal protection pursuant to the Fourteenth Amendment had been violated, that he intended to commence an action in the United States District Court for the Western District of New York on the 4th day of May, 1973 or at the earliest date and he requested and urged the Niagara County Legislature not to permit the order granted by the Honorable John O. Henderson on April 4, 1973 to become final and further requested the Niagara County Legislature to direct its county attorney to file a notice of appeal so that whatever legal effect might result from an order of dismissal which became final in the previous action might be avoided despite the fact that the previous action was not in the nature of a class action, that in the previous action the aggrieved voters were not represented nor was the necessary foundation laid pursuant to Rule 23 of the Federal Rules of Civil Procedure, nor was said action a true class action which would have any effect upon the class action of which Mr. Shedd advised the Niagara County Legislature he contemplated commencing forthwith.

9. Your deponent was advised by Mr. Shedd that the Niagara County Legislature had rejected the request of Mr. Shedd and directed its county attorney not to file notice of appeal. In other words, such Legislature specifically declined to represent the interests of the aggrieved voters of Niagara County who had supported the proposition for a Niagara County Charter at a time when the previous action entitled *County of Niagara, New York vs. State of New York* had not been finally dismissed. The contention by the attorneys for the defendants under said circumstances that the principle of collateral estoppel applies in this action in bar of the cause of

action alleged by the aggrieved voters of Niagara County is totally without merit.

10. Further, the substantial federal constitutional question pleaded in the within action was not pleaded in the previous action nor were the relevant issues and decisions briefed or advocated in the previous action. The substantial federal constitutional question is as follows:

> "A local government having general governmental powers which substantially affects all the citizens equally throughout the entire geographic area served by the body may not create separate voting units based upon race, sex, economic ability or location of residence."

The constitutional principal of equal suffrage is guaranteed by the Equal Protection Clause of the Fourteenth Amendment in local government elections has been defined and redefined in a series of cases commencing with *Avery vs. Midland County, Texas,* 390 U.S. 474, 88 S.Ct. 1114 (1968) and continuing through *Cipriano vs. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897 (1969), *Kramer vs. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886 (1969), *Hadley vs. Junior College District,* 397 U.S. 50, 90 S.Ct. 791 (1970), *Dusch vs. Davis,* 387 U.S. 112, 115, 87 S.Ct. 1554, 1555 (1967) and *Sayler Land Company vs. Tulare Lake Basin Water Storage District,* 93 S.Ct. 1224, decided on March 20, 1973.

This is the substantial federal constitutional issue which pertains to the fundamental constitutional rights of the class of citizens represented by the writer in the within action. That substantial federal constitutional issue was not an issue in the previous *County of Niagara, New York vs. State of New York* action, was not pleaded, briefed or advocated before the

Senior Judge of this district. The only vague reference to the violation of the right to equal suffrage, as a constitutional right protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, is contained in paragraph "24" in the *County of Niagara, New York vs. State of New York* action in which paragraph the issue is not properly presented. The pleader in the complaint in that action alleged only that the issue in the action involved the question that the majority vote should prevail. The fact is that the issue involves much more than majority rule. It involves the deprivation of fundamental rights by fencing people in or fencing them out, depending upon your perspective, based upon race, sex, economic ability and location of residence.

10. The writer respectfully submits that the motion to dismiss the complaint made by the Attorney General of the State of New York on behalf of the defendants Lomenzo and Levitt should be denied in its entirety, that the motion of the plaintiff to strike the affirmative defense of collateral estoppel in the answer of the defendants Graf and Comerford should be granted and further

That a three-judge district court to hear and determine the constitutional issues set forth in this action as required by Title 28, U.S.C. §§ 2281, 2284 should be convened at the earliest opportunity.

JOHN J. PHELAN.

(Sworn to August 3, 1973).

Amended Complaint (Nov. 5, 1973).

UNITED STATES DISTRICT COURT

Western District of New York

CITIZENS FOR ACTION AT THE LOCAL LEVEL, INC. (CALL) and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN P. LOMENZO, the Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York, KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants.

Civil Action
No. 1973-222

I

This is a civil action for a declaratory judgment and for injunctive relief authorized by Title 42, U.S.C., §1983, 1988 to be commenced by a citizen of the United States or any other person within the jurisdiction thereof to redress the deprivation under color of law of rights, privileges and immunities secured by the Constitution and Laws of the United States. The rights, privileges and immunities sought to be redressed herein are those secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., § 1343(3).

II

The action is for a declaratory judgment that a referendum held in the County of Niagara in the State of New York on November 7, 1972, upon the proposition (No. 5 on the ballot), to wit, "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of government be approved?", an abstract of which proposed charter is annexed to the within complaint and designated Exhibit A, must accord each voter in the county the full benefit of his vote within the geographic area of the county as a single unit as a fundamental right of equal suffrage protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the County of Niagara being a local government unit which exercises general governmental powers throughout the geographic area of the county of substantially equal effect upon the entire population of the county.

And further for a declaratory judgment that proposition No. 5, a proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter (Exhibit A), which proposition was submitted to a vote of the electors of the entire geographic area of the County of Niagara, New York, in the general election in the year 1972, held on the 7th day of November, which proposition received 28,885 aye votes and 26,508 no votes in the entire geographic area of the County of Niagara by all qualified electors voting thereon, was duly

adopted and entitled to force and effect in accordance with the rights, privileges and immunities secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

And further for a declaratory judgment that the provisions of Art. 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), that no form of local government or amendment thereof shall become effective unless approved in a referendum by a majority of the votes cast thereon in the area of the county outside of cities and in the cities of the county, if any, considered as one unit is an unconstitutional dilution and debasement of the right of the plaintiff and all members of the class to equal representation pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

And for a further judgment enjoining and directing John P. Lomenzo, the Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; Kenneth Comerford, County Clerk of the County of Niagara, New York and LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York to accept and to file the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, pursuant to § 27 of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Law of New York, § 27,* upon the certification by the Clerk of the Niagara County Legislature that the aforesaid proposed county charter was approved by a majority of the total votes case upon proposition No. 5 in the 1972 general election in the entire geographic area of Niagara County considered as one unit.

III

The plaintiff Citizens for Action at the Local Level, Inc. (CALL) is a membership corporation formed pursuant to the Membership Corporation Law of the State of New York on May 15, 1971 with its principal place of business in the City of Lockport, County of Niagara, State of New York. The territory in which its operations are principally conducted is Niagara County, New York. The purpose of the corporation is to promote the social welfare of the citizens of Niagara County through the improvement of local government, to make local governments more accountable to the people; to make local government more responsive to the needs and desires of the people; to make local government more effective and efficient in their functional operations and in their response to State, Federal and regional governments.

Membership in Citizens for Action at the Local Level, Inc. (CALL) is open to all residents of Niagara County. The membership consists of persons engaged in government, in industry, in labor organizations, in education, in communications, in social and community action and includes representatives of every race, sex, color and religion.

The plaintiff Citizens for Action at the Local Level, Inc. (CALL) has a special interest in and played a leadership role in the advancement of the proposition for a Niagara County Charter. The activities of the plaintiff Citizens for Action at the Local Level, Inc. (CALL) consisted of preparing and publicizing a proposed county charter document, organizing and conducting a series of public meetings throughout Niagara County to inform the citizens regarding said county charter, to apprise the citizens of Niagara County with the necessity for an alteration or amendment of the forms and functions of the units of local government in Niagara County,

and to stimulate public support in the cities of Niagara County and in the area outside the cities of Niagara County for the adoption of a county charter form of local government.

The plaintiff corporation submitted the county charter which it had prepared and publicized to the Niagara County Legislature, participated in a series of meetings with the members of the Niagara County Legislature for the purpose of obtaining legislative approval of a proposed county charter for submission to the electorate of Niagara County and as a result of the special interest of the plaintiff Citizens for Action at the Local Level, Inc. (CALL) and its leadership role, the Niagara County Legislature adopted a local law on September 6, 1972, a county charter for Niagara County, subject to approval by referendum on November 7, 1972.

Thereafter, from September 6, 1972 until the date of the referendum, the plaintiff corporation and its members conducted an extensive publicity campaign throughout Niagara County to secure adoption of said Local Law No. 1 of 1972, urged voters in the cities and in the area outside the cities to exercise their voting franchise in the referendum election and was the leading advocate for the approval of Proposition No. 5, to wit "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of government be approved," all of which demonstrates the special interest of the plaintiff corporation in the alteration and amendment of the forms and functions of local government within Niagara County.

Further, the mission of the plaintiff corporation to promote the social welfare of the citizens of Niagara County through the improvement of local government; to make local government more accountable and responsive to the needs and desires of the people and more effective and efficient in their

functional operations has continued unabated since that time and will continue in the forseeable future.

The board of directors of the plaintiff corporation has duly resolved to seek a judicial determination that the constitutional rights of all citizens of Niagara County, to equal suffrage pursuant to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, whatever their race, their economic status or their place of residence in their vote upon the proposition for the adoption of a county charter form of local government may not be debased or diluted which is the effect of the separate units of voters in the cities and in the area outside of the cities as provided in Art. 9, § 1 (h) (1) of the New York State Constitution.

Further the members of the plaintiff corporation are among the members of the class of aggrieved voters who have heretofore commenced the within action for a declaratory judgment that Art. 9, § 1 (h) (1) of the New York State Constitution is unconstitutional in violation of the right of equal suffrage guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The plaintiff corporation Citizens for Action at the Local Level, Inc. (CALL) is composed of members who are residents of Niagara County who have a special interest in the improvement of local government in Niagara County. That said corporation and the members thereof have a united interest as individuals and as members of said corporation which interest has been affected adversely by the dilution and debasement of the right of equal suffrage of all the voters of Niagara County because of the application of the Art. 9, § 1 (h) (1) of the New York State Constitution to the result of the vote upon proposition No. 5 for the adoption of a county charter form of local government in Niagara County. The adverse effect upon the plaintiff corporation and its members

jointly and individually is that the people of Niagara County have been deprived of the social, governmental and economic benefits that would result from the adoption of a county charter form of government. The debasement and dilution of the right of equal suffrage affects the plaintiff corporation through its members and its members individually in their daily activities and their rights and privileges as citizens and in their opportunity to achieve social justice for the citizens of Niagara County through the improvement of local government. The injury in fact suffered by the plaintiff Citizens for Action at the Local Level, Inc. (CALL) and the significant and direct injury suffered by its members in addition thereto, consists of the deprivation of (1) local government which is more accountable to the people of Niagara County, including the members of plaintiff corporation; (2) local government which is more responsive to the needs and desires of the people of Niagara County, including the members of plaintiff corporation, and (3) local government which is more effective and efficient in their functional operations on behalf of the people of Niagara County, including the members of plaintiff corporation.

IV

The plaintiff Francis W. Shedd at all times mentioned herein was a citizen of the United States and resided at 2620 Main Street in the City of Niagara Falls in the County of Niagara in the State of New York. That at all times mentioned herein he was a taxpayer of the United States of America, the State of New York, the County of Niagara and the City of Niagara Falls. That at all times mentioned herein he was a duly enrolled voter in the 3rd Election District of the 3rd Legislative District of the County of Niagara and did cast a vote from said election district of said legislative district in favor of proposition No. 5, a proposed Local Law No. 1,

1972, in relation to the adoption of a Niagara County Charter, on the 7th day of November, 1972.

V

The plaintiffs bring this action on behalf of the voters of the geographic area selected by the Niagara County Legislature which adopted proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, in which geographic area and referendum election was held as part of the general election in the year 1972 on November 7, thereof, whose vote is being diluted or debased by reason of the provisions of Art. 9, § 1 (h) (1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which provide for two separate voting classes, to wit that no form of county government or amendment thereof, a local government unit exercising general governmental powers, shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and by a separate majority of the votes cast in the cities of the county, if any, considered as one unit. Members of the class on behalf of whom the plaintiffs sue are so numerous that joinder of all members is impracticable and the questions of law or fact common to the class, the claims or defenses of the parties, are typical of the claims or defenses of the class. Further, the plaintiffs have such a personal stake in the outcome of the controversy and have been so personally involved in the efforts of certain residents of the County of Niagara to bring about the adoption of a charter form of local government that their representation on behalf of all the aggrieved voters within the geographic area, to wit the voters whose vote was diluted or debased by the classification of two voting units requiring two

separate majorities, will insure that concrete adverseness which sharpens the presentation of issues upon which the court depends for recognition of difficult constitutional questions and will insure that the interests of the entire class will be fairly and adequately protected. That further, the refusal of the Honorable John P. Lomenzo, the Secretary of State of the State of New York, to accept the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, which refusal prevents the proposed local law from becoming operative, constitutes action in opposition to the class as a whole and the grounds of the action are generally applicable to the class thereby making suitable final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

VI

The defendants in the within action are John P. Lomenzo, the Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk of the County of Niagara, New York, in whose offices the proposed local law must be filed pursuant to § 27 of the Municipal Home Rule Law of the State of New York in order to become operative. On December 8, 1972, the Secretary of State declined to accept the proposed Local Law No. 1 for filing by reason of the fact that the forwarding officer, to wit the Clerk of the Niagara County Legislature, had failed to certify that said proposed local law had been approved pursuant to § 33(7) of the Municipal Home Rule Law of the State of New York which provided that said proposed local law should not become operative unless and until it had received a majority of the votes in the area of the county outside the cities of said

county and a separate majority in the area of the cities of said county considered as a separate unit.

VII

That in the aforesaid referendum election to determine whether or not a charter of local government, to be known as the Niagara County Charter, should be the governing instrument for the people of the geographic area, to wit Niagara County, and whether or not pursuant thereto the people of the geographic area of Niagara County should have the right to elect a Niagara County Executive and a Niagara County Comptroller, the votes cast in favor of such a proposition totalled 28,885 and the votes cast in opposition to such proposition totalled 26,508. That for the purpose of clarity at this point, the votes cast in favor of the proposed local law in the following geographic areas were as follows: within the three cities located within Niagara County—18,220; and in the areas outside of the cities of Niagara County—10,665 for a total of 28,885. That the votes cast in opposition to the proposed local law in the following areas were: within the three cities located within Niagara County—14,915; and in the areas outside of the cities of Niagara County—11,594 for a total of 26,508.

VIII

That the proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter, was adopted by the Niagara County Legislature on September 6, 1972 and submitted to referendum pursuant to Art. 9, § 1 (h) (1) of the New York State Constitution. That said Niagara County Charter (Exhibit A, abstract) was proposed as the governing instrument for a unit of local government, the County of

Niagara, having general governmental powers over the entire geographic area in which no specific group of voters, residents or other persons were primarily affected or interested as compared to another group. Within the geographic boundaries of said unit of local government having general governmental powers, there was contained 3 cities, 5 villages and 12 townships. The general governmental powers and the general responsibility for local government property and affairs to be carried out by the unit of local government to be adopted in the proposed county charter and by the terms of the county law and relevant applicable statutes, were, among others, to set a tax rate, to equalize assessments, to issue bonds, to prepare a budget for the county's needs and to make long term judgments about the way Niagara County should develop—whether industry should be solicited, roads improved, recreation facilities built. The functions to have been performed by said county government pursuant to the proposed Niagara County Charter were to have affected all the residents of Niagara County uniformally and equally. The proposed county charter government, through the county executive and the county comptroller to have been elected pursuant thereto (See Exhibit A attached), contained authority to make substantial numbers of decisions affecting all citizens, whether they reside inside the limits of the three cities of Niagara County. The county charter government would have maintained buildings, administered welfare services, enforced environmental laws, maintained and improved roads, provided health care and drainage and refuse disposal, mental health services and county planning. Real property taxes were to be levied and equalized upon real property in the county. The operating and capital budget expenditures were assessed uniformly upon all the taxpayers of the entire geographic unit. Finally, by the terms of said charter the terms of office of the members of the Niagara County Legislature were extended to four year terms.

IX

The provisions of Art. 9, § 1 (h) (1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which require that (1) no charter or other alternative form of county government or (2) any such form of county government that transfers functions of the cities, towns, villages, districts or other units of government, including the county, to each other or (3) any such form of county government that abolishes one or more offices, departments, agencies or units of government may become effective unless approved on a referendum by a majority of the votes cast in the cities of the county voting as a unit and in the area outside the cities of the county voting as a separate unit is an unconstitutional deprivation of the right of the plaintiff Shedd and other members of the class to the equal protection of the law pursuant to the Fourteenth Amendment in that it violates the principle of equal representation for equal numbers of people without regard to race, sex, economic status or place of residence within the state.

X

The provisions of Art. 9, § 1 (h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which create classifications of voters in each of the counties of the State of New York without any rational justification thereof, without any articulated and permissible state goal and limit the voting franchise of the plaintiff and other members of the class without defining the interests promoted or demonstrating a compelling state interest, constitute a *prima facie* unconstitutional dilution or debasement

of the vote of the plaintiff and members of the class based on the *prima facie* classification in units of voters by reason of their residence in the cities of the county or in the area outside of the cities of the county. A chart of the population of New York State located within the cities of each county and in the area outside of the cities is annexed to the within complaint and designated Exhibit B. Said Exhibit B demonstrates graphically that the classification in the New York State Constitution of voters based upon their residence within the cities or in the area outside of the cities create unequal population voting units but non consistently in favor of city residents or non-city residents but rather creates unconstitutional voting power in favor of resistance to change, in favor of historical rigidity and in furtherance of suspect classification based upon race, sex, economic status and location of residence within the state. The classification deprives this plaintiff and others similarly situated of their constitutional right of equal representation in the determination of forms of local government of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature as a result of the change of the form of said unit of general purpose local government.

XI

Such deprivation of the rights, privileges and immunities secured by the Constitution of the United States are causing the plaintiff Citizens for Action at a Local Level, Inc. (CALL) and the plaintiff Shedd and members of his class serious and irreparable injury and harm for which there is no plain, adequate or complete remedy to redress such wrongs other than a suit for a declaratory judgment and injunctive relief.

XII

The application for a declaratory judgment and for injunctive relief herein restraining the enforcement, operation and execution of Art. 9, § 1 (h) (1) of the New York State Constitution insofar as it provides for separate majorities of voters residing in the cities of a county and in the area outside the cities of a county upon a referendum election to establish a county charter government, a form of general purpose local government and restraining the enforcement, operation and execution of § 33(7) of the Municipal Home Rule Law of the State of New York 35C McKinney's Cons. Laws of New York, § 33(7), on the ground that such constitutional and statutory provisions violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution may not be granted unless it is heard and determined by a district court of three judges pursuant to Title 28, U.S.C. §§ 2281, 2284. The plaintiffs do respectfully request that such a three-judge district court be convened in accordance therewith.

XIII

The venue pursuant to Title 28, U.S.C., § 1391(b) is based upon the fact that this is a civil action in which the claim, to wit the denial of the fundamental right to equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment, arose in the judicial district within which the action is commenced.

WHEREFORE, the plaintiffs respectfully pray on their behalf and on behalf of all members of the class that judgment be granted in favor of the plaintiff in this action by a district court consisting of three judges pursuant to Title 28, U.S.C., §§ 2281, 2284,

(a) declaring that in the referendum held in the County of Niagara in the 1972 general election on the 7th day of November, 1972, upon proposition No. 5, to wit "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of county government be approved?", in which referendum proposition No. 5 received 28,885 votes in favor thereof and 26,508 votes in opposition thereto in the total geographic area of Niagara County as one voting unit, proposition No. 5 was duly adopted pursuant to the provisions of the Equal Protection Clause of the Fourteenth Amendment and is entitled to force and effect as the form of local government for the County of Niagara in accordance with the terms thereof; and

(b) declaring that the provisions of the New York State Constitution, Art. 9, § 1 (h) (1) thereof and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which require that the adoption or amendment of (1) a charter form or other alternative form of county government or (2) any such form of county government which transfers one or more functions or duties of the county or of the cities, towns, villages, districts or other units of local government wholly contained in such county to each other or (3) any such form of county government which abolishes offices, departments, agencies or units of government shall not become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of the cities and in the cities of the county, if any, considered as one unit, violate the Equal Protection Clause of the Fourteenth Amendment; and

(c) declaring that the alternative forms of county government provided by Art. 9, § 1 (h) (1) of the New York State Constitution and by Article 4 of the Municipal Home Rule

Law of the State of New York entitled, "The County Charter Law," 35C McKinney's Cons. Laws of New York, §§ 30-35, are forms of local government which provide general governmental services over an entire geographic area and in which no particular class of the population is specially interested or affected so as to warrant the exclusion of other persons from equal suffrage and, therefore, the approval or amendment of such alternative forms of county government on a referendum must be conducted in a single voting unit in order to accomplish the equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment; and

(d) enjoining and directing the defendants to accept proposition No. 5, the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, and to file the same in their respective offices upon due service of a certified copy of an order of this court to said effect; and

(e) directing that the election of a Niagara County Executive and a Niagara County Comptroller as provided in proposition No. 5 be held at the earliest available opportunity at a general election or a special election called therefor, upon the granting and entry of a final order and judgment in favor of the plaintiff in the within action, with the terms and conditions of such election to be settled at the time of the granting and entry of an order adjudging and determining the rights, privileges and immunities of the plaintiffs and the members of the class as asserted in the within action to be secured by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

(f) awarding the plaintiffs such further and different relief as may seem appropriate from the pleadings and proceedings in this action and which the court may deem just

and proper and further awarding the plaintiffs such costs, fees and disbursements as may be deemed appropriate for the prosecution of the within action.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Attorneys for the Plaintiffs.

[Exhibits A and B to the Amended Complaint are identical to Exhibits A and B to the Original Complaint, *supra* pp. 19-35, and thus not again reproduced].

Plaintiffs' Notice of Motion to Require Admissions (May 27, 1974).

(Amended Title).

PLEASE TAKE NOTICE that upon the complaint in the within action, the undersigned will move this Court on the 10th day of June, 1974 at 10:00 a.m. on that date or as soon thereafter as counsel can be heard for an order requiring the defendants, John J. Ghezzi, (successor to John P. Lomenzo) Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York to admit the following facts pursuant to Rule 36 of the Federal Rules of Civil Procedure within two (2) days of the service of an order to such affect upon the attorney for such defendants, to wit:

1. The classification of voters contained in Article IX § 1 (h) (1) of the New York State Constitution is not a classification of voters which is necessary to promote an articulated state goal;

2. The classification of voters contained in Article IX § 1 (h) (1) of the New York State Constitution is not a classification created to promote a compelling state interest;

3. The classification of voters contained in Article IX § 1 (h) (1) of the New York State Constitution is a classification based solely upon the geographic location of the voter within the total area in which the election franchise is exercised.

PLEASE TAKE FURTHER NOTICE that at such time and place the plaintiffs will seek other relief that the Court deems just and proper.

Dated: May 27, 1974,
Buffalo, New York.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE.

Affidavit in Support of Plaintiffs' Motion to Require Admissions (May 28, 1974).

(Amended Title.)

JOHN J. PHELAN being duly sworn deposes and says:

1. That he is an attorney-at-law duly licensed to practice law in the State of New York and is associated with the law firm of Moot, Sprague, Marcy, Landy, Fernbach & Smythe, 2300 Main Place Tower, Buffalo, New York 14202, the attorneys for the plaintiffs in the within action.

2. That a three judge district court, pursuant to Title 28 U.S.C. §§ 2281 and 2284 has been convened to hear and determine this action and this action has been set down for hearing by such Court on June 20, 1974.

3. That in the absence of a contention by the defendants, John J. Ghezzi, (successor to John P. Lomenzo) Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York, that the separate voting units provided in Article IX § 1 (h) (1) of the New York State Constitution are necessary to promote a constitutionally permissible state goal, your deponent believes that the plaintiffs will be entitled to summary judgment in this action.

4. That in order to prove that the State of New York has no such constitutionally permissible state goal prior to the hearing of this action, your deponent desires to compel said defendants to admit the absence of such state goal pursuant to Rule 26 of the Federal Rules of Civil Procedure and since there is not sufficient time to obtain such admissions by a notice thereof, your deponent requests that an order be granted as provided for by Rule 36 of the Federal Rules of Civil Procedure.

5. That the defendants, LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk, County of Niagara, New York have answered and have admitted that no such constitutionally permissible state goal exists justifying the separate voting units provided for in Article IX § 1 (h) (1) of the New York State Constitution. The defendants, John J. Ghezzi, (successor to John P. Lomenzo) and Arthur Levitt have not answered the plaintiffs' complaint.

6. That the furnishing of said admissions or the denial thereof will determine if there is a question of fact in this action regarding an alleged compelling state interest and in the event that the defendants, John J. Ghezzi, (successor to John P. Lomenzo) and Arthur Levitt contend that the State of New York has such a state goal, to wit, the classification of voters

into "city" voters and into "area outside the city" voters which is constitutionally permissible, the parties should be prepared to offer proof thereof on June 20, 1974.

WHEREFORE the plaintiffs request that an order be granted requiring the defendants, John J. Ghezzi (successor to John P. Lomenzo) and Arthur Levitt to respond to the plaintiffs' request for admissions contained in the notice of motion herein, within forty-eight (48) hours of the service of an order granting such request and for such other relief that this Court may deem just and proper.

JOHN J. PHELAN.

(Sworn to May 28, 1974).

Plaintiffs' Notice of Motion for Summary Judgment (May 27, 1974).

(Amended Title.)

PLEASE TAKE NOTICE that upon the complaint in the within action and upon the answer of the defendants, La Verne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford County Clerk, County of Niagara, New York, the defendants, John J. Ghezzi, (Successor to John P. Lomenzo) The Secretary of State of the State of New York, and Arthur Levitt, Comptroller of the State of New York, having thus far failed to answer the plaintiffs' complaint and upon all the proceedings heretofore had in the within action, the undersigned will move this Court, constituted as a three judge district court, at

a Term of said Court to be held on the 20th day of June, 1974 at 10:00 a.m. on that date or as soon thereafter as counsel can be heard for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedures of the issues contained in the plaintiffs' complaint and for such other relief that the Court may deem just and proper.

Dated: May 27, 1974,
Buffalo, New York.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE.

Plaintiffs' Affidavit in Support of Motion for Summary Judgment (May 28, 1974).

(Amended Title.)

FRANCIS W. SHEDD being duly sworn deposes and says:

1. That he is a plaintiff in the within action and brings said action on behalf of the class of disenfranchised voters of the County of Niagara, New York, whose vote on November 7, 1972 in favor of Proposition No. 5, a proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter was diluted and debased by reason of the action by the defendants in tabulating such votes separately in the cities and in the area outside the cities of such county pursuant to Art. IX, § 1 (h)(1) of the New York Constitution.

2. That this is an action to obtain a declaratory judgment and more than twenty (20) days have expired from the commencement of the action.

3. That the defendants Graf and Comerford have answered and have admitted the substantive allegations of the plaintiffs' complaint. The defendants Ghezzi (Successor to Lomenzo) and Levitt have not answer.

4. That the classification of voters into voting units defined as the "cities of a county" and the "area of the county outside the cities" contained in Article IX § 1 (h) (1) of the New York State Constitution is a *prima facie* violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. There is no genuine issue of any material fact and the plaintiff is entitled to judgment as a matter of law upon the complaint in the within action.

5. That the constitutional issue contained in the plaintiffs' complaint is settled in light of previous decisions of the Supreme Court of the United States and the constitutional question is adequately presented and your deponent believes that there is no issue of fact concerning the classification of voters into "city" voters and "area outside of the city" voters which would be constitutionally permissible.

WHEREFORE your deponent requests that this Court grant summary judgment declaring the rights of the plaintiffs as requested in the complaint and appropriate injunctive relief and such further relief that the Court deems appropriate, together with the costs, expenses and disbursements in this action.

FRANCIS W. SHEDD.

(Sworn to May 28, 1974).

Answer of Defendant New York State Officials, to Amended Complaint and Motion for Summary Judgment (June 6, 1974).

(Amended Title.)

Defendants John J. Ghezzi, (successor to John P. Lomenzo), The Secretary of the State of the State of New York and Arthur Levitt, Comptroller of the State of New York, as and for their Answer to the complaint herein by their attorney Louis J. Lefkowitz, Attorney General of the State of New York, by Michael G. Wolfgang, Assistant Attorney General, of Counsel, sets forth as follows:

FIRST: ADMITS each and every allegation contained in Section I.

SECOND: ADMITS so much in Section II as alleges that proposed Law No. 1 received 28,885 aye votes and 26,508 no votes.

THIRD: DENIES any substantial injury or interest affecting plaintiff alleged in Section III paragraph "9" and in Section XI.

FOURTH: ADMITS so much of Section III as describes the formation and activities of the Citizens for Community Action at the Local Level.

FIFTH: ADMITS each and every allegation in Section IV.

SIXTH: ADMITS so much of Section V that states the requirements of Article IX, Section 1(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York.

SEVENTH: ADMITS each and every allegation in Section VI.

EIGHTH: ADMITS each and every allegation in Section V.

NINTH: ADMITS each and every allegation in Section XIII.

Answer of Defendant New York State Officials, to Amended Complaint and Motion for Summary Judgment (June 6, 1974).

TENTH: DENIES each and every allegation of the complaint not heretofore Admitted, Denied, Controverted or Qualified.

AS AND FOR A FURTHER DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS PURSUANT TO RULES 12(b) and 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE SET FORTH AS FOLLOWS:

ELEVENTH: The complaint fails to state a claim against defendants upon which relief can be granted.

TWELFTH: The complaint fails to raise substantial constitutional questions.

THIRTEENTH: The complaint fails on the ground that plaintiff is barred and collaterally estopped from raising these issues.

FOURTEENTH: That plaintiffs, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, have not shown a constitutionally protected interest or adequately presented any injury from which relief can be granted.

FIFTEENTH: The constitutional issue contained in the plaintiffs' complaint has been decided between these same parties. (*County of Niagara, New York v. State of New York*, CIV. 1972-656 decided January 29, 1973).

SIXTEENTH: The plaintiffs, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, have been afforded each and every regret mandated by the Equal Protection Clause of the United States.

SEVENTEENTH: That the plaintiff is not a disenfranchsied voter.

EIGHTEENTH: That the decision to classify voters into voting units defined as "The Cities of a County" and "the area

Answer of Defendant New York State Officials, to Amended Complaint and Motion for Summary Judgment (June 6, 1974).

of the County outside the Cities", contained in Article IX, Section 1(h)(1) of the New York State Constitution was not a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.

NINETEENTH: That the requirement of what form of county government is a purely state function and is subject to its balancing process to create reasonable classifications supported on a legitimate state interest.

TWENTIETH: There is no genuine issue of any material fact and the defendants are entitled to judgment as a matter of law.

WHEREFORE, defendants, John J. Ghezzi, (successor to John P. Lomenzo), The Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York, respectfully request:

(a) an order pursuant to Rule 12-b (6) of the Federal Rules of Civil Procedure dismissing the complaint; or

(b) an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to defendants; and

(c) In addition, award to defendants the costs and disbursements of this action, and grant to defendants such other and further relief as to the Court seems just and proper.

Dated: Buffalo, New York,
June 6, 1974.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendants
John J. Ghezzi and Arthur
Levitt.

Defendant New York State Officials' Answer to Requested Admissions (June 6, 1974).

(Amended Title.)

John J. Ghezzi, (successor to John P. Lomenzo), The Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York, defendants, make the following statement in response to the request for admission of facts served upon them by plaintiffs on May 31, 1974:

Request No. 1—They deny the matters set forth in Request No. 1.

Request No. 2—They deny the matters set forth in Request No. 2.

Request No. 3—They deny the matters set forth in Request No. 3.

Dated: Buffalo, New York,
June 6, 1974.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for defendants,
John J. Ghezzi and Arthur Levitt.

Proposed Niagara County Charter Adopted by the Niagara County Legislature on August 20, 1974 for Referendum on November 5, 1974.

NIAGARA COUNTY

TEXT OF PROPOSED
NIAGARA COUNTY CHARTER

NIAGARA COUNTY SEAL

Adopted August 20, 1974, by the Niagara County Legislature, subject to approval by Referendum on November 5, 1974.

NIAGARA COUNTY CHARTER

ARTICLE I

NIAGARA COUNTY AND ITS GOVERNMENT.

Section 101. *Title and Purpose.* This charter together with any and all amendments hereto, if any, shall provide for and constitute the form of government for Niagara County, and shall supersede any and all other forms of government for the County of Niagara, including any charter previously adopted, and shall be known and may be cited as the "Niagara County

Charter". Among other purposes of this charter are the following: Separation of County Legislative and Executive functions and responsibilities; the securing of the greatest possible County Home Rule and the accomplishment of an increased efficiency, economy and responsibility in the Niagara County Government.

Section 102. *County Status, Powers and Duties.* Niagara County, upon adoption of this charter, as hereinafter provided, shall be and remain a municipal corporation under its then name and shall exercise all of the rights, privileges, functions and powers conferred upon it by this charter, code and any other applicable statute not inconsistent with such charter or code. It shall be subject to all duties and obligations imposed upon it by existing or subsequent laws not inconsistent herewith, including all powers necessarily incidental to or which may be fairly implied from the powers specifically conferred upon such county.

Section 103. *Charter Effect on State Laws.* This charter provides a form and structure of County Government in accordance with the provisions of the Municipal Home Rule Law of the State of New York, and all special laws relating to Niagara County and all general laws of the State of New York, shall continue in full force and effect except to the extent that such laws have been repealed, amended, modified or superseded

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Article I con't.

. . . in their application to Niagara County by enactment and adoption of this charter and code. Within the limitations prescribed in said Municipal Home Rule Law wherever and

whenever any state law, general, special or local in effect, conflicts with this charter or the code or is inconsistent therewith, such law shall be deemed to the extent of such conflict or inconsistency, to be superseded by this charter and code insofar as the County of Niagara and its government are affected.

Section 104. *Charter Effect on Local Laws, and Resolutions.* All local laws and resolutions of the Legislature of the County of Niagara heretofore adopted, and all of the laws of the State relating to the Towns, Cities, Villages or Districts of the County of Niagara, shall continue in full force and effect except to the extent that such laws have been repealed, amended, modified or superseded in their application to Niagara County by the enactment and adoption of this charter and code.

Section 105. *Local Government Functions, Facilities & Powers Not Transferred, Altered or Impaired.* No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code.

Section 106. *Contracts with Public Corporations & Public Authorities.* The County of Niagara shall have power to contract with any public corporation including but not limited to a municipal district or public benefit corporation as defined in Section 66 of the General Construction Law or with any public authority or combination of the same for the establishment, maintenance and operation of any facility and the rendering of any service which each of the contracting parties would have legal authority to establish, maintain, operate or render for itself. The costs and expenses incurred as well as charges for central facilities and administrative services re-

lating thereto shall be borne proportionately by each such contracting party as agreed upon.

Section 107. *Definitions.* Wherever used in this charter, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

Article I con't.

(a) "county" shall mean the County of Niagara.

(b) "charter" and "county charter" shall mean the Niagara County charter and all amendments thereto.

(c) "code" shall mean the Niagara County administrative code and all amendments thereto.

(d) "county legislature" shall mean the elective legislative body of the County of Niagara.

(e) "administrative unit" shall mean any department, executive division, institution, office or other agency of county government except a bureau, division, section or other subordinate part of any of the foregoing.

(f) "administrative head" shall mean the head of any administrative unit.

(g) "authorized agency" shall mean any agency authorized by this charter, administrative code, or applicable law, including but not limited to those authorized by section 224 of the county law, to receive and expend county funds for a county purpose.

(h) "executive division" shall include but not be limited to the divisions of budget, purchase, central services,

economic development and planning and such other divisions of the executive department as may be hereinafter authorized.

(i) "quorum" shall mean a majority of the whole number of the membership of the board, commission, body or other group of persons or officers charged with any county public power, authority or duty to be performed or exercised by them jointly, and not less than a majority of the whole number may perform and exercise such power, authority or duty. "Whole number" shall mean the total number which the board, commission, body or other group of persons or officers would have, were there no vacancies, and were none of the persons or officers disqualified from acting.

ARTICLE II

LEGISLATIVE BRANCH.

Section 201. *County Legislature & Term of Office.* The Legislators of the County of Niagara, when lawfully con-

vened, shall constitute the Niagara County Legislature, which shall be the legislative, appropriating, and policy-determining body of the County.

The term of office of the members of the County Legislature shall be four years and shall begin on the 1st day of January next following their election.

Section 202. *Powers and Duties.* Except as otherwise provided in this charter, the county legislature shall have and exercise all such powers and duties now or hereafter conferred or imposed on said legislature by applicable law, and any and all powers necessarily implied or incidental thereto, and in addition, shall have, but not by way of limitation, the following powers and duties:

(a) To make appropriations, levy taxes, incur indebtedness and adopt a budget.

(b) To exercise all powers of local legislation in relation to enacting, amending or rescinding local laws, legalizing acts, resolutions or other legislation subject to veto by the County Executive in only such instances as are specifically provided in this charter, code or by other applicable law.

(c) By local law to adopt, amend and/or repeal an administrative code which shall set forth the details of administration of the County Government consistent with the provisions of this charter, and which code may contain revisions, simplifications, consolidations, modifications and restatements of special laws, local laws, resolutions, rules and regulations consistent with this charter or amendments thereto.

(d) By local law to create, alter, combine or abolish County administrative units not headed by elective officials.

(e) To adopt by resolution all necessary rules and regulations for its own conduct and procedure.

(f) Subject to the constitution and general laws of the State of New York, to fix the number of hours constituting a legal day's work for all classes of county employees and grant to the appointing officer or board authority to stagger working hours.

(g) To fix the compensation of all officers and employees paid from County funds.

(h) To fix the amount of bonds of officers and employees paid from County funds.

(i) To make such studies and investigations as it deems to be in the best interests of the County and in connection therewith to obtain and employ professional and technical advice, appoint temporary advisory boards of citizens, subpoena witnesses, administer oaths, and require the production of books, papers and other evidence deemed necessary or material to such study or inquiry.

(j) To legalize and validate any act had and taken in

. . . connection with a lawful municipal purpose or for a lawful municipal object or purpose by the governing board or other local body, officer, or agency of a municipality, wholly within the County, in the manner provided by Section Two-hundred Twenty-seven of the County Law.

(k) To create such positions as may be deemed necessary and in the best interests of county government.

(l) To determine and make provision for any matter of County Government not otherwise provided for, including, but not by way of limitation, any necessary matter involved in the transition to this charter form of Government.

Section 203. *Local Laws; Definition; Power to Adopt, and Repeal; Effect on Legislative Acts.* A local law is a law adopted pursuant to this charter within the power granted by the Constitution, act of the legislature or provision of this charter, and shall not include a resolution or legalizing act.

The County may adopt, amend and repeal a local law. A local law may relate to the property, affairs or government of the county. In the exercise of such power the county may change, supersede or amend any act of the New York State Legislature except as otherwise specifically prohibited by the Municipal Home Rule Law of the State of New York. Such power shall include but not be limited to whatever power is vested in any county in the State of New York or the elective governing body thereof to adopt, amend and repeal local laws granted by any provisions of general laws, special laws, charter, administrative codes, special acts or local laws.

Section 204. *Form and Procedure.* Every local law shall be entitled, "Local Law No. ....., Year ....." (amending, etc. or otherwise as the case may be). If a local law amends a specific state statute or specific local law, the matter to be eliminated shall be enclosed in brackets or parenthesis and the new matter

Article II con't.

. . . underscored or italicized.

Except as may otherwise be provided in this charter, the procedure for the adoption of a local law including referendum, mandatory or permissive, shall be as provided in the code and in the absence thereof by applicable law.

Section 205. *Filing and Publication of Local Laws; Judicial Notice.* The filing and publication of local laws shall be as provided by The Municipal Home Rule Law or other applicable statute and the Court shall take judicial notice of all local laws and of rules and regulations adopted pursuant thereto.

Section 206. *Referendum.* A local law shall be subject to mandatory or permissive referendum when required or authorized by applicable law.

Section 207. *Effective Date.* After adoption, every local law shall become effective when filed in the Office of the Secretary of the State of New York, or on such later date as may be provided in said local law.

ARTICLE III

EXECUTIVE BRANCH.

Section 301. *County Executive; Election; Qualifications and Compensation.* There shall be a County Executive who shall be elected from the County at large, and who shall at all times be a qualified elector of the County. The County Executive shall hold no other public office except as otherwise herein provided; shall give his whole time to the duties of the office, and shall receive therefor a compensation as fixed by the County Legislature. The term of office shall begin with the first day of January, 1976, next following his election and shall be for four years.

Section 302. *Powers and Duties.* It shall be the duty of the County Executive, subject to the provisions of this charter and code, to supervise and direct the internal structure and organization of each department. Except as may otherwise be provided in this charter and subject to confirmation by the County Legislature where provided, the County Executive shall appoint the head of every County Department and Office and members of County Boards and Commissions.

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Article III, Section 302 - con't.

In addition to any other powers and duties provided by this charter or code, the County Executive shall:

(a) Supervise and direct the internal structure and organization of each department or other administrative unit, the head of which he has power to appoint.

(b) Determine and fix real property equalization rates among the various County taxing districts for County purposes and file same with the County Legislature on or before the first day of November in each year.

(c) Designate one or several depositories located within the County for deposit of County funds, subject to approval by the County Legislature.

(d) Approve or disapprove sufficiency of sureties on official bonds and undertakings.

(e) Report to the County Legislature annually at the close of the fiscal year, or as soon thereafter, as practicable but in no event later than the first day of March, and at such other times as the County Legislature shall direct, the activities of the several administrative units and departments of the

County during the preceding fiscal or current year in such detail as the County Legislature shall require and direct.

(f) Appoint a member of the County Legislature to serve as Chairman of such Legislature: (1) for the remainder of the calendar year in case the County Legislature has failed to select a Chairman on or before February 1, or (2) for the unexpired term of the previous Chairman in case the County Legislature has failed to select a Chairman within thirty days after a vacancy has occurred in the office of the Chairman.

(g) Perform such other duties and have such other powers as may be prescribed for him by law, code, ordinance or resolution of the County Legislature.

(h) Have such necessary, implied and incidental powers to perform and exercise the duties and functions specified above or lawfully delegated to him.

Section 303. *Removal of County Executive.* The County Executive may be removed in the manner provided in the Public Officers Law for the removal of other County officers.

Article III con't. (2)

Section 304. *Acting County Executive; How Designated; When to Act.* The County Executive shall designate in writing one or more appointive department or executive division heads to perform the duties of the county executive during the latter's temporary inability to perform by reason of absence from the County or disability. Such appointment, with order of succession specified, shall be filed with the Clerk of the County Legislature and any such designation may be revoked at any time by the county executive filing a new designation

with the Clerk of the County Legislature. If a vacancy occurs in the office of the county executive, the acting county executive shall serve until the vacancy is filled pursuant to this charter.

In the event that no acting county executive has been designated or is able to serve, the County Legislature shall designate an appointive department or executive division head to perform the duties of the office during the inability of the county executive to perform by reason of absence from the County or disability.

Section 305. *Division of Budget.* There shall be in the office of the county executive a division of the budget headed by a budget director who shall be appointed by, and serve at the pleasure of, the county executive, subject to confirmation by the County Legislature. The budget director shall assist in the preparation and administration of the operating and capital budgets and program, and in the study of administrative efficiency and economy.

Section 306. *Division of Purchase.* There shall be in the office of the county executive, a division of purchase, the head of which shall be a purchasing director who shall be appointed by, and serve at the pleasure, of the county executive, subject to confirmation by the County Legislature; the purchasing director shall, in accordance with the requirements as to advertising and competitive bidding, make purchases and sales of all materials, supplies and equipment and contract for rental or servicing of equipment for the County, except as otherwise provided in this charter or the code. He shall not contract for or furnish any services, equipment or other articles except upon receipt of authorized requisitions and certifications as to availability of funds.

Section 307. *Division of Central Services.* There shall be in the office of the county executive a division of central services headed by a central services director who shall be appointed by, and serve at the pleasure of the county executive, subject to confirmation by the County Legislature. Such director shall have such powers and perform such duties in relation to and including, but not limited to, storage of supplies and materials, printing and mimeographing, mailing and data processing as shall be prescribed in the administrative code.

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Article III con't. (3)

Section 308. *Division of Economic Development & Planning.* There shall be in the office of the County Executive, a division of economic development and planning, headed by a director who shall be appointed by and serve at the pleasure of the County Executive, subject to confirmation by the County Legislature. There shall continue to be a Niagara County Planning Board as provided by law.

The director shall assist the director of the Division of Budget in the preparation and administration of the capital budget and program and shall offer grantsmanship services to the same division. The director shall assist the County Executive with other executive planning, including preparation of all county plans. The director may contract to perform professional services with any municipality or municipalities, subject to approval by the County Executive and the Legislature, and shall act as a resource service for municipalities in acquiring funds for programs from sources other than county government, and assist them in preparing

necessary documents. The director shall conduct such studies relating to county government, business and affairs as the Executive or Legislature deem necessary, with recommendations for program implementation. The director shall also cooperate with organizations, agencies and individuals to secure desirable industrial and commercial development of Niagara County and his office shall act as a clearing house for such information concerning the County, and shall make an annual report and undertake projects designed to improve communications between local and county government and between government and private business. The director shall perform such other and related duties as required by the County Executive.

Section 309. *Administrative Heads; Term; Interim Appointment; Appointment of Other Officers and Employees.* The County Executive may appoint one head for one or more departments or other administrative units, subject to any and all requirements as to qualifications and confirmation, or may himself so serve without such confirmation.

All appointments by the County Executive shall be in writing and filed in the Office of the Clerk of the County Legislature and the County Clerk within ten days after the date of such appointment. No such appointee shall hold office beyond the term of the County Executive by whom the appointment was made except as otherwise provided by this charter and except that unless removed he shall continue to serve until his successor is appointed and has qualified or until an interim appointment is made.

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Article III con't. (5)

Upon confirmation by the County Legislature and qualifying for the office, an appointee to the position of a head of a department or any administrative unit shall enter upon the duties thereof. In the event the County Legislature has neither confirmed nor rejected an appointment within a period of forty days after the filing thereof with the Clerk of the Legislature, such appointment shall be deemed to be confirmed. Awaiting action by the County Legislature, the County Executive may designate a qualified person to serve as such head for a period not to exceed forty days in any calendar year.

All other officers and employees of each department or other administrative unit, shall be appointed by the head thereof, within appropriations therefor. The County Executive shall, within appropriations therefor, appoint without the approval of the County Legislature such officers and employees in his own office as may be necessary for the full discharge and performance of his duties.

Section 310. *Confirmation by County Legislature.* Confirmation of appointment when required shall be by affirmative vote of a majority of the whole number of the members of the County Legislature taken at a regular or special meeting.

Section 311. *Veto Power.*

(a) *General Veto Power.* The County Executive shall have power, within ten (10) days after the passage by the Niagara County Legislature of a local law or resolution, to veto any local law or resolution. A duplicate of every local law shall be certified by the clerk of the legislature and filed

by said clerk with the County Executive within five (5) days after its passage. If the County Executive approves it, he shall sign it and return to such clerk and it shall be deemed to be adopted. If he vetoes it, he shall return it to such clerk and must set forth his written objections thereto and the clerk shall present the same with such objections to the Legislature at its next regular or special meeting and such objections shall be entered in its journal. The Legislature, within thirty (30) days after its return to the clerk may, by a two-thirds vote of the whole number of its members, override such veto. Only one vote shall be had to override such veto, which vote

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Article III con't. (6)

shall be taken by roll call and entered in the journal. If, within ten (10) days after its passage, the County Executive shall not return it either approved or vetoed to the clerk, it shall be deemed to be adopted with like effect as if he had approved and signed it.

(b) *Line Item Veto Power.* The Executive, within five days, may separately disapprove the sum of money appropriated by any one or more items, or parts of items in any law or resolution appropriating money for the use of the county government or any agency or commission, in any manner provided herein. The one or more separate items or parts of items disapproved shall be void to the extent that they have been disapproved, unless they shall be separately restored to the law or resolution and become effective by the vote of two-thirds of the members of the Legislature.

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ARTICLE IV

DEPARTMENT OF FINANCE

Section 401. *Department of Finance; Commissioner; Election; Elective Office of Treasurer Abolished.* There shall be a department of finance headed by a commissioner of finance who shall be elected from the county at large. His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1976, at which time a commissioner of finance shall be elected for a four year term to commence January 1, 1977, and every commissioner of finance elected thereafter shall have a term of four years. At the time of his election and throughout his term of office he shall be a qualified elector of the county, shall devote his whole time to the duties of his office, and shall hold no other public office. The elective office of county treasurer shall be abolished as of January 1, 1977.

Section 402. *Powers and Duties.* Except as otherwise provided in this charter or code, the commissioner of finance shall:

(a) be the chief fiscal officer and the chief accounting officer of the county;

(b) collect, receive, have custody of, deposit and disburse all fees, revenues and other funds of the county or for which the county is responsible;

(c) submit reports to the County Legislature in such form and detail and at such times as may be prescribed by the County Legislature;

(d) perform all duties now performed by a county treasurer or other county officer in relation to the collection of taxes;

(e) except as otherwise expressly provided in this charter or code, have all the powers and perform all the duties conferred or imposed upon a county comptroller under the County Law;

(f) prescribe the form of receipts, vouchers, bills or claims to be filed by all administrative units, departments, offices or officials, institutions, and other agencies of the county;

(g) audit all books, records and accounts of the various administrative units, departments, offices or officials paid from County funds, institutions and other agencies of the County, including bond and note registers and trust accounts, and the accrual and collection of all county revenues and receipts, and for this purpose have access to all such books, records and accounts at any time, subject to the periodic audit done by the Certified Public Accountant as herein provided;

(h) examine and approve for payment all contracts, purchase orders, and other documents by which the county incurs financial obligations, having ascertained before approval that monies have been duly appropriated or provided

for and alloted to meet such obligations and will be available when such obligations shall have become due and payable, and record such obligations and encumbrances of the respective appropriations from which such obligations are to be paid.

(i) Approve all bills, invoices, payrolls and other evidence of claims, demands, or charges paid from county funds or by any county agency or payments for which the county, its officers or agents are responsible, except when payment shall be ordered by a court of competent jurisdiction, and determine the

(i) . . . regularity and correctness of the same;

(j) prescribe such methods of accounting for the county and its administrative units and agencies as he may deem necessary, provided the same shall have been approved by the county executive and the state comptroller;

(k) perform such other duties pertaining to the financial affairs of the county as may be directed by the county legislature, the county executive or by any law or by any officer of the state authorized to do so by law.

Section 403. *Divisions of the Department.* There shall be the following divisions within the Department of Finance: Division of Accounting and Payroll, Division of Taxation and Division of Audit. Each division shall be headed by a Deputy appointed by the Commissioner of Finance, subject to approval by the County Legislature.

ARTICLE V

FINANCIAL PROCEDURES

Section 501. *Fiscal Year.* The fiscal year of the county shall begin with the first day of January and end with the last day of December of each year.

Section 502. *Preparation of Proposed Budget and Capital Program.* The budget director shall prepare a proposed budget and capital program for submission to the County Executive in such manner and form as shall be prescribed by this charter or the code.

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Article V con't.

Section 503. *Proposed Budget and Capital Program by County Executive.* The County Executive shall submit to the clerk of the county legislature, on or before the 5th day of October of each year, for consideration by such legislature, a proposed budget for the ensuing fiscal year, and a capital program for the next six fiscal years.

Upon its submission, the proposed budget and capital program and budget message hereinafter provided shall become a public record in the office of the clerk of the County Legislature, and copies of the same shall be made available by such Clerk for distribution.

The proposed budget shall present a complete financial plan for the county and its administrative units for the ensuing fiscal year setting forth proposed expenditures and anticipated surplus and revenues, and shall include: (1) an operation and maintenance expense budget and (2) a capital budget covering debt service, down payments and other current capital financing, and proposed borrowing, if any.

Section 504. *Budget Message.* The County Executive shall also submit with the proposed budget, a message explaining the main features of the budget including among other things, a general summary thereof with such supporting schedules as

he may deem desirable or the County Legislature may by resolution require. Such schedules shall exhibit the aggregate figures of the proposed budget in such manner as to show a balanced relationship between the total estimated expenditures and the total estimated income for the ensuing fiscal year, and shall compare these figures with the actual receipts and expenditures for the last completed fiscal year and the appropriations for the current fiscal year. Such budget message shall also outline the existing and any proposed financial policies of the county relating to the capital program describing each capital improvement proposed to be undertaken within the ensuing fiscal year, showing the estimated cost, the pending or proposed method of financing it and the projected operation and maintenance

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Article V con't. (2)

. . . expense. The budget message shall contain such additional information or comments as are deemed advisable by the county executive.

Section 505. *Review of Proposed Budget; Capital Program and Message.* The county legislature and the finance committee designated by such legislature shall review the proposed budget, the capital program and budget message as submitted by the county executive and shall, not later than the 7th day of November, file with the clerk of the county legislature its report including any recommendations proposed therein.

Such report shall become a public record in the office of the clerk of the County Legislature, and copies thereof shall be made available by such clerk for distribution.

Section 506. *Public Hearing.* Not later than the 8th day of November, the clerk of the County Legislature shall cause to be published in the official newspaper and such other newspapers as may be designated by the County Legislature, a notice of the place and time, not less than five days after such publication nor later than the 21st day of November, at which the County Legislature will hold a public hearing on the proposed budget, the capital program, the budget message submitted by the County Executive and the report submitted by the County Legislature and a committee designated by such Legislature.

Article V con't. (3)

Section 507. *Adoption of Budget.*

(a) After the conclusion of the public hearing, the County Legislature may strike items of appropriation or anticipated revenues from the tentative budget or reduce items therein, excepting appropriations required by law or for debt service.

The Legislature may add items to or increase items in such budget.

(b) If a budget has not been adopted by the County Legislature, subject to the line item veto power of the County Executive as set forth in Section 311(b) on or before the 25th day of November, then the proposed budget as submitted by the County Executive shall be the budget for the ensuing fiscal year.

(c) The budget as formally adopted should be balanced.

(d) Five (5) copies of the budget as adopted shall be certified by the Clerk of the County Legislature and one each of such copies shall be filed in the office of the County Executive, the offices of the Budget Director, the Commissioner of Finance and the Clerk of the County Legislature.

The budget as so certified shall be printed or otherwise reproduced and copies shall be made available.

Article V con't. (4)

Section 508. *Levy of Taxes; Inclusion of Reserve for Uncollected Taxes.* The net county tax requirement, determined by subtracting the total estimated revenues and surplus from the total proposed expenditures as set forth in the adopted budget, shall be levied in advance by the County Legislature on the taxable real property of the several tax districts of the county. The taxes so levied shall include an amount to be known as "reserve for uncollected taxes" which shall be a county charge.

The County Legislature shall fix the amount of such a sum as they may deem sufficient to produce in cash from the collection of taxes and other revenues during the year, moneys required to meet the estimated expenditures of such year, provided, however, that such reserve for uncollected taxes shall be not less than the face amount of unpaid taxes for the preceding completed fiscal year.

The amount of all taxes, special ad valorem levies and special assessments levied upon any parcel of real property by the County Legislature shall, except as otherwise expressly provided by law, be and become a lien thereon as of the first

day of January of the fiscal year for which levied and shall remain a lien until paid.

Section 509. *Appropriations: Supplemental and Emergency.* All supplemental and emergency appropriations shall be made in accordance with the provisions of the County Law or other applicable State law.

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Article V con't. (5)

Section 510. *Appropriations: Reduction and Transfer After Budget Adoption.* If at any time during the fiscal year it appears that the revenues available will be insufficient to meet the amounts appropriated, the County Executive shall report to the County Legislature without delay the estimated amount of the deficit; remedial action taken by him, and his recommendations as to further action. The County Legislature shall take such action it deems necessary to prevent or minimize any deficit. For that purpose it may by resolution reduce one or more appropriations; but no appropriation for debt service may be reduced, and no appropriation may be reduced by more than the unencumbered balance thereof or below any amount required by law to be appropriated. The legislature may also if it so desires borrow temporarily pursuant to the local finance law in an amount not greater than such deficit for such purpose.

The County Executive may at any time during the fiscal year transfer part or all of any unencumbered appropriation balance between classifications of expenditures within the same administrative unit, provided that prior approval by resolution of the County Legislature shall be required if the proposed transfer (1) would result in an increase exceeding

one thousand dollars annually, or such larger amount as may be prescribed by local law, during the fiscal year in any one line item in the budget as adopted, or (2) would affect any salary rate or salary total except as expressly permitted in this charter or code. If the County Executive requests in writing, the County Legislature by resolution effective immediately may transfer part or all of any unencumbered

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Article V con't. (6)

. . . appropriation balance from one county administrative unit to another provided however, that no such transfer shall be made from appropriations for debt service, and no appropriation may be reduced below any amount required by law to be appropriated.

Section 511. *Certain Resolutions of the County Legislature Require a Two-Thirds Vote.* A resolution of the County Legislature for any of the following specified purposes shall be passed by not less than a 2/3 vote of the whole number of the members of the County Legislature: (a) a supplemental or emergency appropriation; (b) the issuance of budget notes or notes in anticipation of the collection of taxes or revenues; and (c) the issuance of bonds, bond anticipation notes or capital notes.

Section 512. *Certain Obligations and Payments Prohibited.* No payment shall be authorized or made and no obligation incurred against the county except in accordance with appropriations duly made, or except as permitted otherwise by the local finance law; provided that this shall not be construed to prevent contracting for capital improvements to be financed by borrowing, or entering into any lawful contract

or lease providing for the payment of funds beyond the end of the current fiscal year.

Section 513. *Performance of Acts: Scheduling.* Whenever the scheduling of the performance of an act shall be fixed by this article the same may be changed by the code or an amendment thereof.

Section 514. *Summary of Receipts and Expenditures.* The Commissioner of Finance shall submit to the county legislature a monthly summary of receipts and expenditures compared with the budgeted receipts and expenditures. Annually, the Commissioner shall submit a complete financial statement showing receipts and expenditures vs. budget and total assets and liabilities of the county.

Section 515. *Independent Audit.* The county legislature must provide for an annual independent audit by certified public accountants.

ARTICLE VI

DEPARTMENT OF ASSESSMENT

Section 601. Department of Assessment; Director of Real Property Tax Services; Appointment

Section 602. Powers and Duties

Section 601. *Department of Assessment; Director of Real Property Tax Services; Appointment.* There shall be a department of assessment, the head of which shall be the director of real property tax services, who shall be appointed on the basis of his qualifications for the duties of the office. Such director

shall be appointed by the County Executive, subject to confirmation by the County Legislature for a six year term.

Section 602. *Powers and Duties.* Except as otherwise provided in this charter or code, the director of real property tax services shall perform all of those duties required of him pursuant to Title II, Sections 1530-1536 of the Real Property Tax Law of the State of New York, or other statute supplementary or amendatory thereto, and

(a) keep a record of the transfer of title to real property and immediately notify the town or city assessors of all such transfers in each town or city as the case may be.

(b) make available a consultation and advisory service to assist local assessors in the performance of their duties and in the establishment and maintenance of suitable procedures and facilities to improve assessment records and practices.

(c) submit annually to the county executive on or before the 1st day of September, proposed county tax equalization rates consistent with standards prescribed by the legislature of the State of New York.

(d) perform all duties in relation to the extension of taxes and such other related duties in connection therewith as shall be prescribed by the county executive or county legislature;

(e) perform such other and related duties as shall be required or delegated to him by the County Executive or the County Legislature.

ARTICLE VII

BOARD OF ACQUISITION AND CONTRACT

Section 701. *Board Created; Powers and Duties.* There shall be a board of acquisition and contract which shall consist of the County Executive, Commissioner of Public Works, and the Chairman of the County Legislature. The Board of Acquisition and Contract shall contract for and acquire by purchase or condemnation, all lands, buildings and other real property, the acquisition of which has been authorized by the County Legislature, and shall award all contracts for the construction, reconstruction, repair or alterations of all public works or improvements, subject to the approval of the County Legislature.

Section 702. *Execution of Contracts.* All contracts except for the purchase of supplies, materials, equipment and services incidental thereto shall be executed on behalf of the County by the County executive in accordance with the provisions of this Article. Whenever such contract involves the expenditure of funds in excess of those set forth in the General Municipal Law or other applicable state law, except contracts for the acquisition of real property, the contract shall be awarded to the lowest responsible bidder by sealed bids or proposals made in compliance with the public notice published at least once in a newspaper designated by the Board of Acquisition and Contract at least 10 days prior to the day on which such sealed proposals are to be opened. The

bids or proposals shall be opened publicly in the presence of at least two members of the Board of Acquisition and Contract or their representatives. The successful bidder must give security for the faithful performance of his contract, the adequacy and sufficiency of which shall be approved by the Board of Acquisition and Contract. No contract shall be executed by the county executive on behalf of the county until the same has been approved as to form by the county attorney. A copy of each contract when executed, shall be filed with the Commissioner of Finance, together with a copy of any act, other than the annual appropriation act, upon which the right to make such contract rests.

Section 703. *Prequalification of Bidders.* The Board of Acquisition and Contract may require the prequalification of bidders on any contract, subject to such conditions or procedure as shall be established by the County Legislature.

ARTICLE VIII

DEPARTMENT OF PUBLIC WORKS

Section 801. *Department of Public Works; Commissioner; Qualifications.* There shall be a department of public works, the head of which shall be the commissioner of public works, who shall be appointed on the basis of his experience and qualifications for the duties of the office. Such commissioner shall be appointed by the County Executive, subject to con-

firmation of the County Legislature. Upon the effective date of this charter, the county department of highways and the department of engineering, if any, shall be divisions of the department of public works.

Section 802. *Powers and Duties.* Except as otherwise provided in this charter or code, the commissioner of public works shall:

(a) Have all the powers and duties of a county engineer and a county superintendent of highways, pursuant to the highway law or other applicable law.

(b) Have charge and supervision of the design, construction and alteration of the county buildings, parking fields, drives, walks, preserves, beaches, erosion projects and other structures and facilities in the nature of public works under the jurisdiction of the county.

(c) Have charge and supervision of maintenance, repair and alteration of buildings owned or leased by the county, parking fields, drives, walks, preserves, beaches and other structures and facilities in the nature of public works under the jurisdiction of the county including custodial care, unless otherwise provided in the code.

(d) Have such powers and duties in relation to county facilities for drainage, flood control, sanitation, sewerage, or water supply as may be prescribed in this charter, code or other applicable law.

(e) Furnish engineering and other services to the County Legislature, the County Executive, the Department of Planning and other county departments except as otherwise provided in this charter or code.

Article VIII con't.

(f) Have charge of and have the duty of performing such other functions concerning county property, public works and other matters as the County Legislature or the County Executive may, from time to time, direct.

Section 803. *Divisions of the Department.* There shall be the following divisions within the Department of Public Works: Division of Highways, Bridges and Structures, Division of Buildings and Grounds, Division of Engineering, and such other divisions as may be created within the department by local law or resolution of the County Legislature. Each division shall be headed by a deputy who shall be appointed by the Commissioner of Public Works, subject to approval of the County Legislature. It shall be the duty of each division head while holding such position to carry out the functions of such division as provided by the code, local law or by directives of the Commissioner, or by resolution of the County Legislature.

ARTICLE IX

DEPARTMENT OF PARKS AND RECREATION

Section 901. *Department of Parks and Recreation; Commissioner.* There shall be a department of parks and recreation headed by a commissioner, who shall be appointed by the county executive, subject to confirmation by the county legislature.

Section 902. *Deputy Commissioner.* If and when the county legislature shall establish and create such position, there shall be a deputy commissioner of parks and recreation whose duties will be to plan and schedule all recreational activities in any and all of the facilities mentioned in section 903. He shall be appointed by the commissioner of parks and recreation, subject to confirmation by the county legislature. He shall perform such additional and related duties as the county executive may prescribe.

Section 903. *Powers and Duties.* Except as otherwise provided in this charter, the commissioner shall have supervision and control over the design, construction, operation, maintenance and repair of all county-owned and operated properties and facilities for the following purposes: parks and recreation facilities therein, docks and marinas, beaches,

zoological and botanical gardens, forest lands and golf courses, together with buildings, structures, roads, parking areas, utilities, equipment and appurtenances, He shall perform such additional and related duties as the county executive may prescribe.

Section 904. *County Parks and other Recreational Facilities.* The county legislature is hereby authorized on behalf of the county to accept by gift and to acquire by purchase, condemnation, lease or otherwise, real property for the purposes set forth in Section 903 hereof. The county legislature may abandon such purposes by local law and may dispose of such property.

Section 905. *County Parks Commission.* There shall be a Niagara County Parks Commission appointed by the County Executive, to render advice and guidance to the parks commissioner, as provided in the Administrative Code.

ARTICLE X

DEPARTMENT OF SOCIAL SERVICES

Section 1001. *Department of Social Services; Commissioner.* There shall be a department of social services headed by a commissioner who shall be appointed by the County Executive, subject to confirmation by the County Legislature, pursuant to the Social Services Law of the State of New York.

Section 1002. *Powers and Duties of the Commissioner.* Except as otherwise provided in this charter and code, the commissioner of social services shall:

(a) Have all powers and perform all the duties conferred on or required of a county commissioner of social services under the Social Services Law or other applicable law;

(b) Manage and supervise the Niagara County Infirmary, and any other public welfare institutions of the county when authorized by the county executive and approved by resolution of the County Legislature; and

(c) Perform such other and related duties as shall be required or delegated to him by the county executive and/or the County Legislature.

ARTICLE XI

DEPARTMENT OF HEALTH

Section 1101. *Department of Health; Commissioner; Qualifications.* There shall be a department of Health headed by a commissioner of health who shall be appointed by the Board of Health of the County of Niagara, pursuant to applicable State statutes.

Section 1102. *Powers and Duties of Commissioner.* Except as otherwise provided in this charter, the commissioner of health shall have all the powers and perform all the duties

conferred or imposed upon county or part-county health commissioners and/or county or part county boards of health by law. In addition thereto, he shall perform such other and related duties as shall be required or delegated to him by the County Executive or County Legislature.

Section 1103. *Board of Health; Powers and Duties.* There shall be in the department, a county Board of Health, the members of which shall be appointed by the Chairman of the County Legislature. The composition of such board in relation to the number of members and the professional, governmental or other representation, and the terms of such members shall be as provided in the public health law for a county board of health.

Section 1104. *Sanitary Code.* The Board of Health may formulate, promulgate, adopt and publish rules, regulations, orders and directions relating to health in the County, which shall not be inconsistent with the Public Health Law or the State Sanitary Code. Such rules, regulations, orders and directions shall be known as the County Sanitary Code. Any and all provisions of the Niagara County Sanitary Code in effect at the time of the adoption of this Charter shall remain in full force and effect until amended or repealed by the Board of Health.

The provisions of the County Sanitary Code shall have the force and effect of law. Penalties and violations of all non-conformance with such Code shall be as provided by such Code or other applicable law. Certified copies of such code shall be received in evidence in all courts and proceedings in the State.

Section 1105. *Organization of the Department.* The department of health shall be organized into such divisions and bureaus as shall be prescribed in the administrative code.

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ARTICLE XII

DEPARTMENT OF MENTAL HEALTH

Section 1201. *Department of Mental Health; Director; Qualifications.* There shall be a department of mental health headed by a director who shall be appointed by the Mental Health Board, qualified according to the standards fixed by the State Commissioner of Mental Hygiene, in accordance with the provisions of Article 8(A) of the Mental Hygiene Law.

Section 1202. *Powers and Duties.* Except as otherwise provided in this charter, the director of mental health shall have all the powers and perform all the duties now or hereafter conferred or imposed upon a director of community mental health and/or community mental health boards by law. He shall perform such other and related duties as shall be required or delegated to him by the County Executive or County Legislature.

Section 1203. *Mental Health Board.* The Chairman of the County Legislature shall appoint a mental health board, such board to recommend and suggest to the County Executive a

program of community mental health services and facilities and rules and regulations concerning the rendition or operation of services and facilities in the community mental health program.

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ARTICLE XIII

DEPARTMENT FOR YOUTH

Section 1301. *Department for Youth; Director.* There shall be a Department for Youth headed by a director for youth who shall be appointed by the county executive, subject to confirmation by the county legislature.

Section 1302. *Powers and Duties of the Director.* The Director for Youth shall have all the powers and duties heretofore or hereafter imposed or conferred by the laws of the State of New York, and such other related duties as shall be required or delegated to him by the county executive or the county legislature.

Section 1303. *Niagara County Youth Board.* There shall be an advisory board called the Niagara County Youth Board to be appointed by the county executive in the manner prescribed by the administrative code.

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Proposed Niagara County Charter Adopted by the Niagara County Legislature on August 20, 1974 for Referendum on November 5, 1974.

ARTICLE XIV

DEPARTMENT FOR THE AGING

Section 1401. *Department for the Aging; Director.* There shall be a Department for the Aging, headed by a director who shall be appointed by the county executive, subject to confirmation by the county legislature.

Section 1402. *Powers and Duties of the Director.* The director shall have all the powers and duties heretofore conferred or imposed by the laws of the State of New York, and such other related duties as shall be required or delegated to him by the county executive or the county legislature.

Section 1403. *Advisory Committee.* There shall be an advisory board called the Advisory Committee to the Department for the Aging, to be appointed by the county executive in the manner prescribed by the administrative code.

Proposed Niagara County Charter Adopted by the Niagara County Legislature on August 20, 1974 for Referendum on November 5, 1974.

ARTICLE XV

DEPARTMENT OF PERSONNEL

Section 1501. *Application of Article XV; Niagara County Civil Service Commission Continues; Civil Service Law to Apply.* The Niagara County Civil Service Commission is continued for the purpose of administering Civil Service Law for Niagara County. The powers, duties and functions of the Civil Service Commission may be transferred to the Department of Personnel at the discretion of the Niagara County Legislature if found to be in the best interests of county government.

Section 1502. *Department of Personnel; Director.* There shall be a department of personnel headed by a director who shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office by the County Executive subject to confirmation by the County Legislature.

Section 1503. *Powers and Duties.* The personnel director shall prepare personnel rules for county officers and employees for adoption by the county legislature. He shall administer the personnel system of the county in accordance with such personnel rules; he shall prepare and maintain a compensation plan for all county positions providing uniform pay for like services; he shall prepare and administer a merit

system; he shall maintain personnel records for all county employees; he shall conduct continuing research of all aspects of personnel administration for the purpose of improving the morale and efficiency of county employees, and he shall perform such other duties as required by the county executive.

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ARTICLE XVI

DEPARTMENT OF LAW

Section 1601. *Department of Law; County Attorney.* There shall be a department of law headed by the County Attorney, who shall be appointed by, and whose term shall be the same as the County Executive. He shall be duly admitted to the practice of law in the State of New York, and a resident of the County of Niagara.

Section 1602. *Powers and Duties.* Except as otherwise provided in this charter or code, the County Attorney shall be the sole legal advisor for the County and every agency and office thereof on civil matters, and on its behalf in county matters of a civil nature, advise all county officers and employees and, where in the interest of the county, prepare all necessary papers and written instruments in connection therewith; prosecute or defend all actions or proceedings of a civil nature brought by or against the County; on request prepare resolutions, legalizing acts and local laws to be presented for action by the County Legislature, together with notices and other items in connection therewith; and perform such other

and related duties as may be prescribed by law, by the County Executive or by resolution of the County Legislature.

Section 1603. *Deputy and Assistant County Attorneys.* The County Attorney shall have the power to appoint such deputy county attorneys, assistant county attorneys, confidential clerk, officers and employees of his department as shall be authorized by the County Legislature and within the appropriations made therefor. All deputy and assistant county attorneys shall be in the exempt class of the Civil service and shall serve at the pleasure of the county attorney.

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ARTICLE XVII

DEPARTMENT OF RECORDS

Section 1701. *Department of Records; County Clerk; Election.* There shall be a department of records headed by a county clerk who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1976, at which a county clerk shall be elected for a three year term to commence on January 1, 1977, and every county clerk elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

Section 1702. *Powers and Duties.* Except where inconsistent with this charter, the county clerk shall appoint such deputies, officers and employees of the department as may be authorized by resolution of the County Legislature and shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law.

ARTICLE XVIII

DISTRICT ATTORNEY

Section 1801. *Election.* There shall be a district attorney who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1976, at which a district attorney shall be elected for a three year term to commence on January 1, 1977, and every district attorney elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, and duly admitted to the practice of law in the State of New York. He shall devote his whole time to the duties of his office and shall hold no other public office.

Section 1802. *Powers and Duties.* The district attorney shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law.

ARTICLE XIX

PUBLIC DEFENDER

Section 1901. *Public Defender, Appointment, Term.* There shall be a Public Defender who shall be appointed by the County Legislature and whose term of office shall be for four years. He shall be duly admitted to the practice of law in the State of New York a resident of the County of Niagara.

Section 1902. *Powers and Duties.* The office of Public Defender shall have such powers and duties as defined in Article 18 (A) and 18 (B) of the County Law of the State of New York.

Section 1903. *Deputy and Assistant Public Defenders.* The Public Defender shall have the power to appoint such confidential deputy public defenders, assistant public defenders, officers and employees of his department as shall be authorized by the County Legislature and within the appropriations made therefor. All deputy and assistant public defenders shall be in the exempt class of the civil service, and shall serve at the pleasure of the public defender.

ARTICLE XX

SHERIFF

Section 2001. *Election.* There shall be a sheriff who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election shall not take effect until the general election of 1976, at which a sheriff shall be elected for a three year term to commence on January 1, 1977, and every sheriff elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

Section 2002. *Powers and Duties.* The sheriff shall appoint such deputies, officers and employees of the department as may be authorized by resolution of the County Legislature and shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law.

ARTICLE XXI

MEDICAL EXAMINER

Section 2101. *Application of Article XXI.* The County Legislature shall have the power by local law, to abolish the office of coroner and create the office of appointive medical examiner. Such local law shall not be subject to mandatory referendum, but must be adopted and filed in the office of the Secretary of the State of New York at least 150 days prior to any general election. The terms of office of all coroners elected or appointed and holding office in the county at the time such local law is adopted and filed as hereinbefore provided, shall expire on the December 31st following the adoption of such local law, and at the general election to be held in such year and thereafter no coroner shall be elected and Article XXI of this charter and applicable provisions of the code shall become and be effective on and after January 1, next succeeding.

Section 2102. *Medical Examiner; Appointment and Qualifications.* There shall be a medical examiner who shall be appointed by and serve at the pleasure of the county executive, subject to confirmation by the County Legislature. He shall be a physician duly licensed to practice in the State of New York, qualified elector of the County, and shall have such other qualifications as may be prescribed in the code.

Section 2103. *Powers and Duties.* The medical examiner shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law and shall perform such other and related duties as shall be required or delegated to him by the county executive or the County Legislature.

ARTICLE XXII

OTHER COUNTY BOARDS, OFFICES, INSTITUTIONS AND FUNCTIONS

Section 2201. *Board of Elections.* The Board of Elections, its powers and duties and the method of appointment of the members thereof by the County Legislature shall continue as provided by law.

Section 2202. *Probation Office; Director.* There shall be an office of probation headed by a probation director who shall be appointed in the manner provided by Section 256 (5) of the

Executive Law of the State of New York, and shall have such powers and duties as are provided by law.

Section 2203. *County Hospital; Board of Managers.* The Board of Managers of Mount View Hospital, its powers and duties and the method of appointment of the members thereof shall continue as provided by law.

Section 2204. *Certain Board; How Appointed.* The appointment of any board or agency in relation to a county sewer, drainage or watershed protection district, if any, or to any other county district of a similar nature, shall be by the County Legislature.

Section 2205. *Fire Coordinator; How Appointed.* The Fire Coordinator shall be appointed by the County Legislature upon recommendation of the Fire Advisory Board. The Fire Advisory Board shall continue to be appointed as set forth in the Niagara County Fire Mutual Aid Plan.

Section 2206. *Other Boards; How Appointed. All other boards shall continue as provided by law.*

Section 2207. *Additional Appointments by County Executive.* Subject to confirmation by the County Legislature, and except as otherwise provided in this charter and code, the County Executive shall appoint the head of any other or additional administrative unit of the county including among others, the director of civil defense; county historian; sealer of weights and measures; director of veterans' services, upon consideration of recommendations of the veterans' service agencies in the county.

Except as otherwise provided in this charter or code, other appointments to boards and like units shall be made by the county executive subject to confirmation of the county legislature. The administrator of the Workmen's Compensation however, shall continue to be appointed as now provided by local law and the laws of the State of New York applicable thereto.

Section 2208. *Miscellaneous Administrative Functions.* Administrative functions not otherwise assigned by this charter or code shall be assigned by the county executive to an administrative unit.

ARTICLE XXIII
GENERAL PROVISIONS

Section 2301. *Administrative and Advisory Boards.* The board of trustees of the Niagara County Community College

shall have such powers and only such powers as those specified in the Education Law of the State of New York. Except as otherwise provided in this charter or code, every other board, the members of which are appointed, shall be an advisory board consisting of such members, and the members thereof shall be appointed for such terms as are or may be provided in this charter or the code. Wherever provision is made in this charter or code for the appointment of an advisory board, the members so appointed, unless otherwise provided, shall serve at the pleasure of the appointing authority.

Section 2302. *Approval of Contracts.* Except as otherwise provided in this charter or code, every contract to which the county is a party shall require approval by the County Legislature, if said contract is for (a) the sale or purchase of real property; (b) the erection, alteration or demolition of a building or other structure; (c) the providing of facilities or the rendering of services by, for or with any other public corporation. All such contracts shall be executed by the county executive, except as otherwise provided in this charter or the code.

Section 2303. *Civil Service rights continued; status of certain county officers previously appointed; removal of certain county officers hereafter appointed.* The civil service status

and rights of all county employees and their beneficiaries, including but not limited to those with respect to retirement and social security, shall not be affected by this charter or code. Except as otherwise provided by this charter or code, the terms of all county officers whose appointment under this

charter is vested in the county executive shall terminate on December 31, 1979, provided that any such officer, unless removed, shall continue to serve until his successor is appointed and has qualified or until an interim appointment is made. Any county officer appointed by the county executive for a definite term or whose appointment is subject to confirmation by the County Legislature may be removed prior to the end of such term, after receipt of written notice from the county executive. A copy of such notice shall be filed in the office of the Clerk of the County Legislature.

Section 2304. *Classified Service, Exemptions.* All positions in all departments, offices, institutions and agencies of the county, shall be in the classified service, except those held by the following: (1) elective officers; (2) heads of departments; (3) members of all boards, commissions and committees; (4) the medical examiner; and (5) the commissioner of jurors. For the purpose of this section the heads of the divisions within the executive branch, including but not limited to purchase, central services, budget and economic development & planning, shall be deemed to be heads of departments. The following positions in the classified service shall be included in the exempt class: (1) deputies who are authorized to act generally for and on behalf of their principals; (2) the confidential secretary to any officer or department head; (3) calendar clerk, personnel officer; (4) deputy and assistant district attorneys; (5) deputy and assistant county attorneys; and (6) contractors engaged to perform specific services and their employees; (7) assistant public defenders.

Section 2305. *Filling Vacancy in Elective Office of Legislator County Executive, Commissioner of Finance, County Clerk, District Attorney or Sheriff.* A vacancy, otherwise than by ex-

piration of term in any elective county office including but not limited to the office of Legislator, County Executive, Commissioner of Finance, county clerk, district attorney or sheriff, shall be filled in accordance with Section 400(7) of the County Law.

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Article XXIII, Section 2305 con't.

The person so appointed shall hold office by virtue of such appointment until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election a legislator, county executive, commissioner of finance, county clerk, district attorney or sheriff, as the case may be, shall be elected for the balance of the term, if any.

Section 2306. *Filling Other Vacancies.* Except as otherwise provided in this charter or code, a vacancy in the office of the head of any administrative unit, the head of which by virtue of this charter the county executive shall have the power to appoint or remove, shall be filled by a person who shall be appointed on the basis of his administrative experience and his qualifications for the duties of such office by the county executive subject to confirmation by the county legislature where provided. Except as otherwise provided in this charter or code, the head of any administrative unit shall have the power to fill vacancies occurring within such administrative unit pursuant to the civil service law.

Section 2307. *Power to Administer Oaths and Issue Subpoenas.* The chairman of the county legislature, the commissioner of finance, the county executive, and such other county officers as may be authorized by this charter, code or

other applicable law shall have the power to subpoena and compel the attendance of witnesses and the production of books, records and papers, as the same may be pertinent to their respective offices. Any county officer authorized to hold a hearing or conduct an investigation shall have the power to administer oaths or affirmations, subpoena witnesses and compel attendance of witnesses in connection therewith.

ARTICLE XXIV

APPLICATION OF CHARTER

Section 2401. *Adoption of Charter; When Effective.* This charter shall become and be effective on and after January 1, 1976, upon approval by public referendum in the manner provided by law. The administrative code may be adopted

and amended by local law at any time subsequent to the approval and adoption of this charter. The first county executive shall be elected at the general election in 1975 and shall take office on January 1, 1976. The Commissioner of finance shall be first elected at the general election in 1976 and the person then elected shall, upon qualifying, take office on January 1, 1977 for a four year term, and every commissioner of finance elected thereafter shall have a term of four years. Pending election and qualifying for office, the incumbent county treasurer, county clerk, district attorney and sheriff shall have the powers and perform the duties prescribed in this charter and code for the elective office of commissioner of finance, county clerk, district attorney and sheriff respectively.

Section 2402. *Amendment of Charter.* This charter may be amended in the manner provided by law. Except as otherwise provided in this charter, any local law which would create or abolish an elective county office, change an elective office to appointive or an appointive office to elective or change the powers of an elective county officer shall be subject to mandatory referendum. No local law which would abolish or change an administrative unit prescribed in this charter or the power of an appointive county officer in the executive branch shall be enacted before January 1, 1976.

Section 2403. *Terms of Certain Elective County Officers.* The terms of office for the county executive and commissioner of finance shall be for four years except as otherwise provided in this charter. The terms of office for the county clerk, district attorney and sheriff shall be three years except as otherwise provided in this charter.

Article XXIV—Continued

Section 2404. *Continuity of Authority; Completion of Unfinished Business.* The performance of functions pursuant to the provisions of this charter shall be deemed and held to constitute a continuation thereof for the purpose of succession to all rights, powers, duties and obligations attached to such functions. Any proceedings or other business undertaken or commenced prior to the effective date of this charter may be conducted and completed by the county officer or administrative unit responsible therefor under this charter or code.

This charter shall not be deemed to invalidate any obligations heretofore issued by the County of Niagara or by any of its commissions, boards or agencies and such obligations shall be and remain binding obligations of the county. In the event any obligation shall have been issued in anticipation of the issuance of bonds by the county or by any of its commissions, boards or agencies, the county is hereby empowered to issue such bonds as legal and binding obligations of the county.

For the purpose of this section a public authority shall not be deemed a county commission, board or agency.

Section 2405. *Separability.* If any clause, sentence, paragraph, section or article of this charter shall be adjudged by any court of competent jurisdiction to be invalid, such adjudication shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or article thereof directly involved in the proceeding in which such adjudication shall have been rendered.

Section 2406. *Charter to be Liberally Construed.* This charter shall be liberally construed to effectuate its objectives and purposes.

Section 2407. *Charter Review Board; establishment, members; Term.* Within five (5) years from the effective date of this charter, the County Legislature shall appoint a Charter Review Board consisting of seven legislators and five lay persons, to review the Niagara County government charter in accordance with the General Municipal Home Rule Law.

Section 2408. *Charter Review Board; Powers and Duties.* The Charter Review Board shall study all aspects of the structure of the Niagara County government, and shall recommend such changes as it deems necessary to strengthen the County government and make it more efficient, effective, and responsive. The Board shall be given the full cooperation of all officials and employees of the County government, including elected officials, and members of boards and commissions. The Board shall have full access to all necessary records of all branches and agencies of the County government except those prohibited by law. The Charter Review Board, upon the completion of its study, shall present to the County Executive and the County Legislature a report and recommendations. The County Executive and the County Legislature, upon receipt of the report and recommendations of the charter review board, shall be required to submit their reactions, in writing, to the charter review board within sixty days.

November 22, 1974 Statement of Board of Canvassers as to Votes Cast November 5, 1974 Referendum.*

COUNTY OF NIAGARA
BOARD OF ELECTIONS
COURT HOUSE
Telephones 434-1086—434-0729
Lockport, New York 14094
November 22, 1974

STATEMENT OF THE BOARD OF COUNTY CANVASSERS OF THE COUNTY OF NIAGARA IN RELATION TO THE VOTES CAST FOR THE PROPOSED COUNTY CHARTER—COUNTY OF NIAGARA.

That the Board of County Canvassers of the County of Niagara, having met at the Board of Elections office of said County on the 6th day of November, 1974 and again on the 12th day of November, 1974, to canvass the votes given in the several Election Districts of said County at the General Election held on November 5, 1974,

DO CERTIFY AS FOLLOWS:

That it appears on such estimate and canvass that the whole number of votes given for the Proposed County Charter were Seventy five thousand seven hundred eighty six 75,786

of which

YES received Nineteen thousand three hundred sixty four 19,364

No received Seventeen thousand four hundred forty four 17,444

Blank votes were Thirty eight thousand nine hundred seventy eight 38,978

75,786

* (Marked as an Exhibit on October 8, 1975.)

*November 22, 1974 Statement of Board of Canvassers as to Votes Cast November 5, 1974 Referendum.**

Note: Break down TOTAL	YES	NO	BLANK	TOTAL
Niagara Falls	7,239	4,356	13,327	24,922
Lockport	1,980	1,682	4,918	8,580
No. Tonawanda	2,086	3,184	7,248	12,518
	11,305	9,222	25,493	46,020
Towns	8,059	8,222	13,485	29,766
	19,364	17,444	38,978	75,786

NORTON F. AURIGEMA,
Norton F. Aurigema, *Commissioner.*

PERRY CHAMBERS,
Perry Chambers, *Commissioner.*

Dated At Lockport, New York
this 22nd day of November, 1974.

Decision of the United States District Court for the Western District of New York, November 22, 1974 (386 F. Supp. 1).

(Amended Title.)

Before TIMBERS, Circuit Judge, and BURKE and CURTIN, District Judges.

TIMBERS, Circuit Judge:

QUESTIONS PRESENTED

On these cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1(h)(1), of the Constitution of the State of New York (McKinney 1969)[1] (hereinafter, New York Constitution), and Section 33(7) of the New York Municipal Home Rule Law (McKinney Supp. 1974-75)[2] (hereinafter, Home Rule Law), the following are the essential questions presented:

[1] Article IX, § 1(h)(1), of the Constitution of the State of New York provides in pertinent part:

> "Counties . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government . . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

[2] Section 33(7) of the New York Municipal Home Rule Law provides in pertinent part:

> "7. A charter law
> (a) providing a county charter . . .
> (b) . . . shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter

(Footnote continued on following page)

(1) Whether dismissal of a prior action brought in the federal court by the County of Niagara, purportedly on behalf of its citizens and voters, against the State of New York which raised substantially the same issues as are raised herein, constitutes a bar to the instant class action under the doctrine of res judicata.

(2) If not, whether creation of dual voting units of unequal population within a single political subdivision of a state, consisting of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

For the reasons stated below, we hold that the instant class action is not barred by dismissal of the prior action brought by Niagara County and that the challenged dual majority requirement impairs plaintiffs' constitutional rights in the respects claimed.

Accordingly, we grant plaintiffs' motion for summary judgment and deny defendants' cross motion for summary judgment; we hold that Article IX, § 1(h)(1), of the New York

(Footnote continued from preceding page)

> generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit. . . ."

Constitution, and its implementing statute, Section 33(7) of the Home Rule Law, violate the equal protection clause of the Fourteenth Amendment; and we order defendants to accept for filing, and to implement, the Niagara County Charter as approved by a majority of the popular vote in the county-wide referendum held on November 7, 1972.

PARTIES TO THE ACTION

[1] Plaintiffs are Citizens For Community Action At Local Level, Inc. (CALL), a New York membership corporation, organized for the purpose of securing a county form of government for Niagara County; and Francis W. Shedd, a resident of the City of Niagara Falls, Niagara County, who voted in favor of the adoption of the Niagara County Charter in the November 1972 referendum. Shedd sues for himself and as representative of a class consisting of those residents of Niagara County whose votes for the County Charter allegedly were impaired by the dual referendum requirement. As individuals who allege that their vote was unconstitutionally diluted and debased, Shedd and the plaintiff class have standing to sue. Gray v. Sanders, 372 U.S. 368, 375 (1963).[3]

Defendants are John J. Ghezzi, Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the Niagara County

[3] While we find it unnecessary to reach the issue, there is some question as to whether an organization has standing to represent its members in certain cases under the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343 (3) (1970). E.g., Warth v. Seldin, 495 F.2d 1187, 1190-95 (2 Cir.), cert. granted, ... U.S. .... (1974); Aguayo v. Richardson, 473 F.2d 1090, 1098-1101 (2 Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

Legislature; and Kenneth Comerford, County Clerk of Niagara County, in whose office a local law must be filed in order to become effective.

JURISDICTION

[2] This court has jurisdiction over the subject matter and the parties pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343(3) (1970).

[3] Since the action seeks injunctive relief with respect to provisions of a New York statute and the New York Constitution, a special statutory district court of three judges was convened to hear and determine the action pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

FACTS

The essential facts alleged in the amended complaint are admitted and may be briefly summarized.

On November 7, 1972, a proposed charter providing for local government, to be known as the Niagara County Charter, was presented to the voters of Niagara County at a county-wide referendum for adoption. Pursuant to the proposed charter, the people of Niagara County would have been entitled to vote for the offices of County Executive and Comptroller. Moreover, the unit of local government provided for in the proposed charter would have had general governmental powers and would have performed substantial governmental functions, including establishment of a tax rate, equalization of assessments, issuance of bonds, maintenance

of county property and roads, and the administration of health and public welfare services.

Although a majority of the county-wide vote favored adoption of the charter form of local government, the separate majority of voters in the areas of Niagara County outside of the cities voted against adoption.[4] Accordingly, the proposed charter was not accepted for filing and ultimate implementation by defendants because of non-compliance with the dual majority requirement of § 33(7) of the Home Rule Laws.

On December 18, 1972, the County of Niagara, purporting to represent its "citizens and voters", commenced an action in the district court, seeking, inter alia, a declaration that Article IX, § 1(h)(1), of the New York Constitution, and § 33(7) of the Home Rule Law were unconstitutional as violative of the one man, one vote principle. That action was dismissed on the merits by Judge Henderson. County of Niagara, New York v. State of New York, Civil 1972-656 (filed April 3, 1973)[5] (hereinafter, *County of Niagara*). On May 4, 1973, plaintiffs commenced the instant action seeking essentially the same relief.

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[4] The vote on the proposed charter was as follows:

	For	*Against*
Cities	18,220	14,914
Areas outside of cities	10,665	11,594
Total	28,885	26,508

The electors of the County approved the charter by a county-wide plurality of 2375 votes.

[5] The County did not appeal from the judgment of dismissal despite the request by plaintiff Shedd that it do so.

CLAIMS OF THE PARTIES

Plaintiffs' essential claim is that Article IX, § 1(h)(1), and § 33(7) deny them equal protection of the laws because they violate the one man, one vote principle. In support of this claim, plaintiffs point out that, pursuant to the challenged provisions, Niagara County is partitioned into two separate voting units of unequal population, one consisting of the cities within Niagara County and the other consisting of the areas of the county outside of the cities; and that the challenged provisions require a majority vote in each unit, regardless of the total popular vote, for adoption in a county-wide referendum of a county charter form of government having general governmental powers.

Accordingly, plaintiffs demand a declaratory judgment (1) that the challenged constitutional and statutory provisions deny them equal protection of the laws in violation of the Fourteenth Amendment; (2) that the Niagara County Charter was duly adopted by a majority affirmative vote in the county-wide referendum held on November 7, 1972; and (3) that the Charter is in full force and effect as the instrument defining the form of local government for Niagara County. In addition, plaintiffs demand an injunction (1) directing defendants to file and implement the Niagara County Charter as adopted; and (2) directing that an election for the offices of County Executive and Comptroller as provided in the charter be held forthwith.

Defendants' position is twofold. They assert, first, that the instant action is barred by dismissal of the prior action brought by the County of Niagara purportedly on behalf of citizens and voters raising substantially the same issues.

Second, with respect to the merits of plaintiff's constitutional claims, defendants assert (1) that, in adopting constitutional and statutory provisions which prescribed procedures to be followed by a county in adopting a new form of government, the State of New York was exercising sovereign powers solely within the domain of state interests and therefore such provisions are insulated from judicial scrutiny; and (2) that a county-wide referendum for the adoption of a form of local government having general governmental powers, as opposed to an election of representatives in such a governmental structure, need not comply with the one man, one vote principle.

The claims of the respective parties are before us on cross motions for summary judgment.

DEFENDANTS' RES JUDICATA DEFENSE

Before reaching the merits of plaintiffs' constitutional claim, our threshold inquiry must be directed to the question of whether plaintiffs in the instant action are barred from relitigating issues considered and rejected by the district court in the prior action, County of Niagara, New York v. State of New York, *supra.*

[4] Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a "final judgment on the merits" in the prior action; (2) identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party to or in privity with a party to the prior action. Kreager v. General Electric Company, 497 F.2d 468, 471 (2 Cir. 1974), quoting from Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944, 955 (2 Cir.), cert. denied, 377 U.S. 934 (1964).

In the instant action, the first two factors stated above are conceded by plaintiffs. There was a final judgment on the merits in *County of Niagara* and the constitutional issues raised and decided there are essentially identical to those presented here.

As for the third requirement of *Kreager,* we hold that the private citizens who are members of the plaintiff class in the instant action are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to that action and there is no basis upon which to hold them in privity with Niagara County. See Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2 Cir. 1972), cert. denied, 411 U.S. 931 (1973); 1B Moore, Federal Practice ¶0.411 [1] (2d ed. 1974).

[5, 6] Absent statutory or contractual authority, a person ordinarily cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party to that litigation purported to represent all individuals who share an interest in the subject matter of the action. Dudley v. Meyers, 422 F.2d 1389, 1393-94 (3 Cir. 1970); 1B Moore, *supra,* ¶0411 [1], at 1253, and ¶0.411[3], at 1423. Cf. Kersh Lake Drainage District v. Johnson, 309 U.S. 485 (1940); United States v. Kabinto, 456 F.2d 1087 (9 Cir.), cert. denied, 409 U.S. 842 (1972). Here there is no claim either that the County of Niagara was authorized to seek vindication of the constitutional rights of its "citizens and voters" or that any member of the present plaintiff class consented to being represented in the prior action by the County.[6]

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[6] Indeed, it is not at all clear that the County of Niagara had standing to represent the interests of its citizens and voters in the prior action. Note 3 *supra.*

Defendants argue, however, that we must look through form to substance and they urge us to characterize *County of Niagara* as a class action. If that were a true class action, and assuming appropriate notice, cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974), vacating 479 F.2d 1005 (2 Cir. 1973), and adequate representation, e.g., Hansberry v. Lee, 311 U.S. 32 (1940), the prior judgment would be binding on the plaintiffs here. The short answer to defendants' claim, however, is that *County of Niagara* was not brought pursuant to Fed.R.Civ.P. 23. Thus, the district court in the prior action was not called upon to make such critical initial determinations under Rule 23 as to whether the County could or would "fairly and adequately protect the interests of the class" claimed by defendants to have been represented. Fed.R.Civ.P. 23(a)(4). Nor was the court afforded the opportunity to consider the desirability or necessity of formulating provisions for notice to members of the class, Fed.R.Civ.P. 23(d)(2); cf. Eisen v. Carlisle & Jacquelin, *supra,* or to deal with similar procedural matters. Fed.R.Civ.P. 23(d)(5).

In short, we hold that (1) because the plaintiffs here were not parties to *County of Niagara,* (2) because the County had no valid authority to sue on behalf of its citizens and voters, and (3) because the prior action was not a proper class action brought pursuant to Rule 23, the third requirement of *Kreager* has not been satisfied. Defendants' defense of *res judicata* must fail.

PLAINTIFFS' CONSTITUTIONAL CLAIM

The gravamen of plaintiffs' complaint is that, by partitioning Niagara County into two separate voting units of

unequal population consisting of the urban areas of the county on one hand and the rural areas on the other, and by requiring separate majorities in each for the adoption of a county charter form of local government having general governmental powers, Article IX, § 1(h)(1), and its statutory implementation, § 33(7), create arbitrary and irrational classifications based solely upon residence which result in a constitutionally impermissible voting pattern.

Defendants, on the other hand, claim that, since counties are no more than subordinate governmental instrumentalities which are created by the state and which hold and exercise power subject to its sovereign will, their internal governmental structure and the procedure for adopting it are not subject to federal judicial scrutiny. In the alternative, they contend that the one man, one vote principle does not apply to the selection of a form of government.

The precise issue here presented appears to be one of first impression.[7] The Supreme Court, however, repeatedly has ruled on the scope and meaning of the one man, one vote principle in numerous decisions since the seminal case of Baker v. Carr, 369 U.S. 186 (1962). Reasoning by analogy from those cases, we hold that the dual majority requirement of Article IX, § 1(h)(1), of the New York Constitution and § 33(7) of the Home Rule Law is not insulated from judicial scrutiny and is unconstitutional because it violates the one man, one vote principle.

[7, 8] Defendants' claim that the challenged state procedure for adopting new forms of local government is immune from judicial scrutiny is wholly without merit. We

[7] With the exception, of course, of *County of Niagara,* the prior action.

recognize the sovereign right of a state to create political subdivisions to assist it in carrying out state governmental functions. From this it does not follow, however, merely because subordinate governmental instrumentalities exist subject to the state's sovereign will, that a state may exercise that will so as to impair constitutionally protected rights of its citizens. As the Supreme Court stated in Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960):

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.' Western Union Telegraph Co. v. Foster, 247 U.S. 105, 114."

Applying the principle of *Gomillion* in Gray v. Sanders, *supra,* the Supreme Court held that, although the State of Georgia was under no obligation to adopt a state primary procedure for the nomination of a candidate for federal and statewide officers, once it has done so the state was required to give "all who particiat[ed] in the election . . . an equal vote . . ." 372 U.S. at 379. Similarly, in Avery v. Midland County, 390 U.S. 474, 480 (1968), the Court held that:

> "[W]hen the State delegates law-making power to local government and provides for the election of local officials . . ., it must insure that those qualified to vote have the right to an equally effective voice in the election process."

[9] The State of New York, having chosen to create subordinate units of government, is not immune from judicial scrutiny when confronted with a claim that its exercise of sovereign power results in the imposition of unconstitutional conditions upon the voters of that political subdivision.

We turn next to the question whether the one man, one vote principle of Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny, has been violated by the dual majority requirement which, as here applied, has had the effect of diluting the votes of the city dwellers of Niagara County by permitting the minority rural voters to veto the adoption of the proposed charter.

Defendants concede that the requirements of Article IX, § 1(h)(1), and § 33(7) would violate that principle if applied to an election of representatives. They seek to distinguish the *Gray-Reynolds-Avery* line of cases, however, on the ground that they did not involve the selection by popular vote of a form of government. They argue further that the more recent decisions of the Supreme Court in Salyer Land Co. v. Tulare Water District, 410 U.S. 719 (1973), and Gordon v. Lance, 403 U.S. 1 (1971), portend a willingness on the part of the Court to sanction greater flexibility in the one man, one vote principle. They say that the dual majority requirement here challenged would pass muster under those recent decisions. We disagree.

[10, 11] The fact that the referendum here in question did not involve election of representatives is not fatal to plaintiffs' complaint. The Supreme Court has applied the one man, one vote principle to non-representational referenda. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bonds); Gordon v. Lance, *supra* (municipal bonds and tax rates); Cipriano v. City of Houma, 395 U.S. 701 (1969) (municipal utility revenue bonds). Nor are we persuaded by defendants' tenuous argument that the principle is inapplicable here because the challenged referendum involved not the incurring of debt but the adoption of a form of local government. Defendants have suggested no reason grounded on precedent or policy why such a referendum, which would have created the elective offices of County Executive and Comptroller need not conform to the one man, one vote principle, while the direct election of those officials would have been required to conform. E.g., Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, *supra.* We find no merit in the suggested distinction.

Defendants place heavy reliance on what they claim is the new flexibility of the one man, one vote principle as reflected in the decisions of the Supreme Court in Salyer Land Co. v. Tulare Water District, *supra,* and Gordon v. Lance, *supra.* We think such reliance, in the context of the instant case, is misplaced.

In *Salyer* the Supreme Court upheld California statutes which limited the franchise with respect to the management of local water storage and flood control units to land owners of the district "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group . . ." 410 U.S. at 728. Unlike the situation in *Salyer,*

the functions which were to have been performed by the county government provided for in the proposed Niagara County Charter were of a general governmental nature. Such governmental functions clearly would have affected all residents of Niagara County. If *Salyer* is relevant at all, it would seem to support plaintiffs' position.

Defendants place their greatest reliance on *Gordon.* There the Supreme Court upheld West Virginia's constitutional and statutory requirement that political subdivisions not incur bonded indebtedness or raise tax rates beyond a stated maximum unless the proposals are approved by 60% of the popular vote. The rationale of *Gordon* is that a state has the right to protect minority interests and those of unborn generations, in certain substantive areas, by requiring a greater than majority vote.

Reasoning by analogy from *Gordon,* defendants argue that, because of the potential long-range, untold consequences of a referendum such as that here involved, the state was justified in placing the responsibility for such a fundamental change as that affecting the form of government in the hands of a super-majority. They argue further that, since each of the separate voting units within Niagara County might have vetoed the adoption of the charter, the dual majority requirement did not "authorize discrimination against any identifiable class", Gordon, *supra,* 403 U.S. at 7, and therefore did not violate the Fourteenth Amendment.

At first blush, this argument would appear to have merit. Upon more careful analysis, however, we find *Gordon* to be distinguishable in these material respects:

> First, the dual majority requirement does not provide, as defendants suggest, for a simple super-majority vote.

Under Article IX, § 1(h)(1), and § 33(7), there is no limit whatever to the minority domination and to the dilution of the majority vote. The Supreme Court specifically declined to consider the constitutionality of such unlimited minority veto. *Gordon, supra,* 403 U.S. at 8 n. 6.

Second, unlike the situation in *Gordon,* the dual majority requirement, as here applied, indeed did discriminate against, and did dilute and debase the vote of, an identifiable group, i.e. the city dwellers of Niagara County.

Third, the Court in *Gordon* reaffirmed, without qualification, its holdings in prior cases where an impermissible "dilution of voting power [was found] because of group characteristics—geographic location . . .—that bore no valid relation to the interest of those groups in the subject matter of the election . . ." 403 U.S. at 4. See Cipriano v. City of Houma, *supra;* Gray v. Sanders, *supra.*

[12] We hold that defendants in the instant case have failed to sustain their heavy burden of demonstrating that the urban-rural voter unit classification imposed by Article IX, § 1(h)(1), and § 33(7), bears any relationship to, or is in any way justified by, the interests of each group in the creation of a county-wide governmental structure.

The Clerk will enter judgment for plaintiffs in accordance with this opinion. No costs.

Declaratory Judgment and Injunction, January 9, 1975.

(Amended Title.)

This cause came on to be heard, before a statutory three judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) consisting of The Honorable William H. Timbers, Judge of the United States Court of Appeals for the Second Circuit and The Honorable Harold P. Burke and The Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, upon cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the New York Municipal Home Rule Law and the court having considered the issues and an opinion having been filed on the 22nd day of November, 1974 written by The Honorable William H. Timbers, U.S.C.J. in which The Honorable Harold J. Burke, U.S.D.J. and The Honorable John T. Curtin, U.S.D.J. concurred,

NOW upon the complaint in the action and upon the answers of each of the defendants and upon the cross motions for summary judgment and oral argument having been heard by the special statutory district court on the 20th day of June, 1974, at the United States Court House in Buffalo, New York, at which time the plaintiffs were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach & Smythe of Buffalo, New York and the defendants John J. Ghezzi, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney General of the State of New York, Michael G. Wolfgang, Assistant Attorney General, of counsel and the defendants LaVerne S. Graf, Clerk of the Niagara County Legislature and Kenneth Comerford, County Clerk of Niagara County

were represented by Samuel L. Tavano, County Attorney, County of Niagara, Miles A. Lance, Assistant County Attorney of counsel, and due deliberation having been had, it is therefore

ORDERED that the motion of the plaintiffs for summary judgment be and it hereby is granted and the motion of the defendants for summary judgment be and it hereby is denied and further, it is hereby

ADJUDGED and decreed that:

1. Article IX § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the Municipal Home Rule of the State of New York [35c McKinney's Consolidated Laws of New York, § 33(7)] are unconstitutional in violation of the guarantee of equal suffrage contained in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and

2. The application of Article IX § 1 (h) (1) of the New York State Constitution and § 33 (7) of the Municipal Home Rule Law of the State of New York [35c McKinney's Consolidated Laws of New York] to the vote upon a referendum for a Niagara County Charter in the 1972 general election has denied the plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and

3. The Niagara County Charter was duly adopted by a majority affirmative vote in the county wide referendum held on November 7, 1972 and

4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further

ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972 and which local law was approved by a majority of the popular vote in such election.

W. H. TIMBERS,
William H. Timbers,
United States Circuit Judge.

HAROLD P. BURKE,
United States District Judge,

JOHN T. CURTIN,
United States District Judge.

Dated: January 9, 1975.

Intervening Defendants' Notice of Appeal to the Supreme Court of the United States, March 6, 1975.

UNITED STATES DISTRICT COURT

Western District of New York

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants,

and

THE TOWN OF LOCKPORT, New York, and FLOYD SNYDER, Individually and as Supervisor of The Town of Lockport,

Intervening Defendants.

Civil Action No. 1973-222.

Notice is hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the final judgment entered

in this action on January 9, 1975 declaring Article IX Section 1(h)(1) of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35 c McKinney's Consolidated Laws of New York, Section 33(7)] unconstitutional as being in violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution, declaring a proposed Charter for Niagara County to be duly adopted, and enjoining and directing the above-named defendants to file and implement the Niagara County Charter set forth in Local Law No. of 1972 for Niagara County.

This appeal is taken pursuant to 28 U.S.C.A. Section 1253.

Dated: Buffalo, New York, March 6, 1975.

VICTOR T. FUZAK,
for
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
1800 One M&T Plaza,
Buffalo, New York 14203,
Telephone: 856-4000,
and
ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON,

Attorneys for Intervening Defendants.

Plaintiffs' Notice of Motion to Amend January 9, 1975 Judgment (August 20, 1975).

(Amended Title.)

Sirs:

PLEASE TAKE NOTICE that upon the affidavit of Francis W. Shedd, one of the plaintiffs-appellees in the above-entitled action, sworn to the 20th day of August, 1975 and upon the judgment of the three-judge District Court in this action granted the 9th day of January, 1975 and upon all the proceedings hereto had in the above-entitled action, a motion will be made before the Honorable John T. Curtin, U.S.D.J., one of the members of the three-judge District Court for further injunctive relief in accordance with Rule 62(c) FRCP in furtherance of the judgment of the court granted on the 9th day of January, 1975 in the within action.

The application to the Honorable John T. Curtin, U.S.D.J., will be made on the 25th day of August, 1975 at 11 a.m. on that date or as soon thereafter as counsel can be heard in the United States District Court in the United States Court House in the City of Buffalo, New York.

The reason for the within application is that the judgment of this court granted on January 9, 1975 enjoins the state and county defendants-appellees to implement the 1972 Niagara County charter as the instrument defining the form of local government for Niagara County. On or about August 1, 1975, the defendant-appellee Kenneth Comerford, the Niagara County Clerk, made a certification to the Niagara County Board of Elections regarding the county offices in Niagara County to be filled in the 1975 general election which is not in accordance with the express language of the judgment of this court granted on January 9,. 1975 and in order to protect the

rights of the class of aggrieved voters upon whose behalf the plaintiff-appellee brought this action, further injunctive relief or direction is required from this court.

That further the undersigned respectfully moves this court for such other or further relief as may be required to aid in the execution of the judgment of this court granted the 9th day of January, 1975.

Dated: Buffalo, New York,
August 20, 1975.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Attorneys for the Plaintiffs-Appellees.

Plaintiffs' Affidavit in Support of Motion to Amend January 9, 1975 Judgment.

(Amended Title.)

Francis W. Shedd being duly sworn deposes and says:

1. That he is one of the plaintiffs-appellees in the above-entitled action.

2. That this affidavit is made in support of a motion for a further order and judgment of the United States District Court pursuant to Rule 62(c) FRCP in aid of the execution of the judgment of this court granted the 9th day of January, 1975 as required to carry out the mandate contained therein.

3. That your deponent believes that this motion is required because on or about August 1, 1975, the defendant-

appellee Kenneth Comerford, the Niagara County Clerk, was required by § 67 of the New York Election Law to certify the county offices to be filled in the 1975 general election and it appears to your deponent that said defendant-appellee did not make such certification in accordance with the express terms of the judgment of this court granted January 9, 1975, i.e. that he implement the 1972 Niagara County Charter.

4. That your deponent is advised that the defendants-appellees contend that the judgment of this court is being implemented in accordance with the provisions thereof.

5. That your deponent further believes that the protection of the substantive constitutional right of the class of aggrieved voters herein which were declared by this court and their right to a form of local government approved by such voters as a class requires adherence to and compliance with the judgment of this court and that any deviation therefrom may jeopardize such constitutional right.

6. That in order to resolve any uncertainty that may exist as to whether the defendants-appellees are complying with the terms of the final judgment granted by this court in the within action on January 9, 1975, the plaintiffs-appellees have brought this motion pursuant to the continuing power of this court to act in furtherance of its judgments.

7. That the uncertainty involves the circumstance that while the within action was pending, a second referendum was held in Niagara County in the 1974 general election upon a proposition for a county charter form of local government in which the votes cast produced the identical result as the 1972 referendum, a majority in favor countywide, a majority of city voters in favor and a majority of voters in the area outside the cities opposed.

8. That as a consequence of the decision of this court and the granting of the judgment of this court on January 9, 1975, the state and county defendants-appellees have determined to comply with such judgment, either as a matter of injunctive relief imposed upon them or as an authoritative statement of constitutional law; and to afford the plaintiffs-appellees their federal constitutional rights, by implementing the 1974 county charter.

9. That your deponent's primary purpose in this action has been to enforce his constitutional right of equal suffrage and the constitutional rights of the class of aggrieved voters he represents, and the conduct of the state-county defendants-appellees in proceeding affirmatively to bring into being a county charter form of government in Niagara County and in implementing the substantive constitutional rights of aggrieved voters is consistent with the constitutional relief sought by the voters herein and is consistent with the judgment of this court on January 9, 1975.

10. However, the state-county defendants-appellees have not sought the approval of this court for this course of conduct which approval in your deponent's judgment seems wise, particularly once the intervenor defendants-appellants contended that such course of conduct constituted an abandonment of the case or controversy which gave rise to the within action for declaratory relief and once the intervenor defendant-appellant contended that the course of action of the state-county defendants-appellees entitled the intervenor defendants-appellants to a judgment vacating the declaration of the constitutional rights of the aggrieved voters.

11. That the first point of which there might be deviation by the state-county defendants-appellees from the mandatory

injunction of this court involved the certification of the county offices to be filled in the year 1975. On July 2, 1975 the defendant-appellee Kenneth Comerford, the Niagara County Clerk, was advised by letter on behalf of your deponent of the position of the plaintiff-appellees on the subject. A copy of such letter is annexed and designated Exhibit "A". Said letter was thereafter amplified by a letter of July 15, 1975 which is designated Exhibit "B".

12. That the plaintiffs-appellees have not received a response to Exhibit "A" or Exhibit "B". Further your deponent has learned that the defendant-appellee County Clerk filed a certification in the office of the Niagara County Board of Elections that the office of Niagara County Executive was to be filled in the 1975 general election without any further explanation.

13. That your deponent brings on this motion to protect the rights of equal suffrage of the class of voters which he represents and for the enforcement of the judgment of this court granted January 9, 1975.

14. That your deponent respectfully submits that enforcement of the final judgment by this court granted January 9, 1975 requires further action by this court in aid of the execution of the judgment including alternatively:

(a) A direction by this court to the defendant-appellee Kenneth Comerford, the Niagara County Clerk, to certify expressly to the Niagara County Board of Elections that the election of the Niagara County Executive is being conducted in accordance with the 1972 county charter;

(b) 1. A direction by this court to the defendant-appellee Kenneth Comerford, the Niagara County Clerk, to certify expressly to the Niagara County Board of Elections

that the office of Niagara County Comptroller is a county office to be filled in the 1975 general election; or

(b) 2. A direction by this court authorizing the decision of the defendant-appellee County Clerk Kenneth Comerford that the office of Niagara County Comptroller shall not be filled in the 1975 general election because the office of Niagara County Treasurer, whom the Niagara County Comptroller is to succeed, has not expired; or

(c) A direction by this court that the action of the state-county defendants-appellees constitutes compliance with the judgment of this court which enjoined the enforcement of the voting rights of the plaintiffs-appellees and that the aggrieved class of voters are receiving the full benefit of the equal suffrage rights, the dilution and debasement of which they complained in this action, through the implementation of the 1974 county charter; and

(d) A finding by this court that there has been no abandonment of the case or controversy which gave rise to the justicible issue in this action but on the contrary there is in being a full implementation of all provisions of the January 9, 1975 judgment of this court in accordance with its terms and consistent with the spirit and tenor thereof; and

(e) Such further relief by this court as is necessary to protect and implement the federal constitutional rights of the aggrieved voters in this action.

FRANCIS W. SHEDD.

(Sworn to August 20, 1975.)

Exhibit "A" to Plaintiffs' August 20, 1975 Affidavit.

July 2, 1975

The Honorable Kenneth Comerford
County Clerk, Niagara County
Niagara County Courthouse
Lockport, New York 14094

Re: Citizens for Community Action at the Local Level, Inc. and F. Shedd vs. John J. Ghezzi, *et al.* and Floyd Snyder; Civil No. 1973-222
Our File No. 73-233-2

Dear Sir:

This letter is intended to advise you concerning the position of the appellees CALL and Shedd in the above entitled action which is on appeal to the Supreme Court of the United States.

The judgment of the three-judge United States District Court in the above entitled action granted on January 9, 1975 enjoins and directs you to implement the County Charter which was the subject of a referendum in Niagara County in the general election of 1972.

§ 67 of the Election Law of the State of New York requires you to certify to the Niagara County Board of Elections the county offices to be filled in the 1975 general election within three months of the date of the general election.

The application of the aforesaid injunction to your responsibility pursuant to such section of the Election Law requires that you certify to the Niagara County Board of Elections, on or prior to August 1, 1975, that the office of Niagara County Executive is to be filled in the 1975 general election; pursuant to the 1972 County Charter for the County of Niagara, which a duly empowered U.S. District Court has

directed and enjoined, shall be implemented as the instrument of local government for Niagara County.

An unusual occurrence has taken place concerning the appropriate governing instrument for Niagara County since the granting of such judgment, i.e., the certification by the Secretary of State of the State of New York of the County Charter which was the subject of a referendum in the general election of 1974 as well as the certification of the 1972 County Charter.

Thereafter, the County Attorney of Niagara County undertook to speak for the Niagara County defendants and to advise the Honorable John T. Curtin U.S.D.J., one of the members of the three-judge U.S. District Court that the 1974 County Charter will be implemented and not the 1972 County Charter. We have no knowledge whether the Niagara County attorney, who has represented you throughout this suit, has express authorization from you to make this statement.

Therefore, we advise you that you are directed and enjoined by the judgment of the three-judge U.S. District Court to implement the 1972 County Charter unless you receive express authorization from said court to implement the 1974 County Charter as a successor instrument of local government for Niagara County.

In the event that you elect to certify to the Niagara County Board of Elections that the office of Niagara County Executive is to be filled pursuant to the County Charter other than the one expressly authorized by the three-judge U.S. District Court, we will immediately request that the court enforce the injunctive provisions of the judgment granted January 9, 1975.

We are prepared to discuss this subject with you at your convenience, for the regularity and legality of the per-

formance of your duty of office in this instance, specifically your duty pursuant to § 67 of the New York Election Law, are of significant public interest.

Sincerely,

JOHN J. PHELAN,
Attorney for Plaintiff-Appellees.

JJP:mm

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Exhibit "B" to Plaintiffs' August 20, 1975 Affidavit.

July 15, 1975

The Honorable Kenneth Comerford
County Clerk, Niagara County
Niagara County Courthouse
Lockport. New York 14094

Re: Town of Lockport, New York, et. al. vs. Citizens for Community Action at the Local Level, Inc., et. al., Sup. Ct. No. 74-1390; Dist. Ct. Civ. No. 73-222; Our File No. 73-233-2

Dear Sir:

Would you kindly refer to our letter of July 2, 1975 in which we advised you of the position of the appellees CALL and Shedd in the above entitled action concerning the implementation of the 1972 County Charter.

In that letter, we referred to the office of Niagara County Executive in reference to the certification required to be made by you pursuant to § 67 of the New York Election Law.

We respectfully direct your attention to the 1972 Niagara County Charter, Article IV Section 401. *Department of Audit and Control; County Comptroller; Election.*

> There shall be a department of audit and control headed by a comptroller who shall be elected from the county at large. His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1973 at which a comptroller shall be elected for a four year term to commence January 1, 1974, and every comptroller elected thereafter shall have a term of four years.

Exhibit "B" Annexed to Plaintiffs' August 20, 1975 Affidavit.

The judgment of the District Court in the above entitled action granted January 9, 1975 enjoins the implementation of such provision of the 1972 County Charter in the 1975 general election and § 67 of the Election Law requires you, as County Clerk, to make the appropriate certification thereof to the Niagara County Board of Elections.

We respectfully reiterate our previous admonition to you concerning the injunctive provisions of the District Court judgment as it applies to you as well as our previous offer to discuss with you and your counsel the performance of your duty pursuant to § 67 of the Election Law.

Sincerely,

John J. Phelan,
for
MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Buffalo, New York,
Attorneys for Appellees,
Citizens for Community Action at
the Local Level, Inc. and
Francis W. Shedd, Individually
and on Behalf of All Others
Similarly Situated.

cc: Samuel L. Tavano, Esq.,
County Attorney,
Niagara County.

bcc: John Simon,
Clarence Gray.

Supreme Court Order Vacating January 9, 1975 Judgment and Remanding to District Court (October 6, 1975).

SUPREME COURT OF THE UNITED STATES

Town of Lockport, New York, *et al.*,
Appellants,

v.

Citizens for Community Action at the
Local Level, Inc., *et al.*

No. 74-1390

Appeal from the United States District Court for the Western District of New York.

This Cause having been submitted on the statement of jurisdiction, motion to affirm and suggestion of mootness,

On Consideration Whereof, it is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974.

October 6, 1975

Plaintiffs' Motion to Amend Amended Complaint, October 7, 1975.

SIRS:

PLEASE TAKE NOTICE that on the 8th day of October, 1975, at 2:00 P.M. on that date, the undersigned will move this Court for permission to amend the Amended Complaint in the above entitled action to set forth a cause of action for a declaratory judgment and for injunctive relief pertaining to a County Charter which was the subject of a referendum in the County of Niagara in the 1974 general election and which was approved by a majority of the votes cast in the County as a whole but did not receive a majority vote in the area outside the cities of the County as required by Article IX, § 1(h)(1) of the New York Constitution, and for such other and further relief as the Court may deem proper in the premises.

The notice herein is within the purview of the motion which is now pending before this Court dated August 20, 1975, and is appropriate in view of the direction by the Supreme Court of the United States that the issue of mootness raised pertaining to the County Charter referenda held in the general elections of 1972 and 1974 be resolved by this Court and the relief sought herein is required to protect the constitutional rights of the plaintiffs to equal suffrage pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Dated: Buffalo, New York,
October 7, 1975.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE.

Decision of the United States District Court for the Western District of New York, October 23, 1975.

(Amended Title).

CURTIN, Chief Judge:

On October 6, 1975 the United States Supreme Court entered the following order in the above entitled case:

> The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new chapter [sic] adopted by Niagara County in 1974.

In view of this direction, and with the consent of the other judges on the panel, I scheduled oral argument on October 8, 1975 and all parties were present. The parties stipulated that the 1974 Charter and also the proceedings in the New York State courts in which the Town of Lockport sought to invalidate the 1974 Charter be marked as exhibits in this case. In that action, Justice Joseph P. Kuszynski, on July 31, 1975, issued a decision in which he cited the action taken by this panel as controlling in his holding that Article IX, Section (1)(h)(1) of the constitution of the State of New York and Section 33(7) of the New York State Municipal Home Rule Law are unconstitutional. The Citizens for Community Action were not named as parties in the state court action. The following is a brief summary of the various agruments made and positions taken by the parties at oral argument.

First of all, the plaintiffs filed a motion to amend the complaint. It is the purpose of the amended complaint to make the 1974 Charter part of the proceedings in this case. Procedurally, plaintiffs' theory is that the election in November proceed as planned; that the Town of Lockport be permitted to litigate the amended complaint before the three-

judge court; and that for the present the court hold ruling on the remand until the court has heard full arguments from the Town. It is plaintiffs' opinion that the case is not moot, that it should be further litigated in federal court, and that there should be no abstention.

The New York State defendants agree that the case is not moot and that there should be a final determination by the Supreme Court. It is the intention of the Secretary of State to permit the 1974 Niagara County Charter to go into effect. When questioned about statewide application, it was first stated that if the question arose in other counties, the State would not follow our decision but would follow state law requiring a double majority. However, is was also stated that since Justice Kuszynski in state court has now held the same section unconstitutional following our decision, for the present the State would not apply the section to other elections in the state. Apparently, the State does not plan to appeal Justice Kuszynski's decision. It is the State's position that the court should not be concerned with the provisions of the Charter, but only with manner in which the referendum was conducted. As to the proposed amended complaint, the State questioned whether the court would be following the Supreme Court's order if it allowed the complaint to be amended.

The Niagara County defendants did not object to the amended complaint as long as the November election was allowed to proceed. In their opinion, the case is not moot and should be litigated in federal court.

Finally, the intervenor-defendant, Town of Lockport, informed the court that the Town intended to appeal Justice Kuszynski's decision, but nevertheless wants this court to hold that the question is moot. The Town admitted that there

are no substantial differences between the 1972 and 1974 Charters, but argued that there was a difference in circumstances, perhaps a difference in political claimant, at the time the Charters were voted upon. The other parties are of the view that the differences between the 1972 and 1974 Charters are minimal. The Town argues that this lawsuit is moot because the 1974 Charter is now certified, thus making the validity of the 1972 Charter no longer an issue warranting resolution by this court.

After considering all of the above arguments, the court finds that this lawsuit is not moot. First of all, as admitted by the Town of Lockport and as is evident from a perusal of the 1972 and 1974 Charters, there is no substantial difference between the two Charters. The only differences are merely technical ones relating to the functions and duties of the various officers and branches of the proposed county government. The Town of Lockport's argument that there was a difference in political climate when the voters approved each Charter is simply irrelevant to a determination of whether the sections are constitutional. In this regard, it should be noted that each Charter was approved by a majority of the voters of Niagara County, with a majority of city voters but a minority in the rural areas.

In an effort to counter the mootness argument raised by the Town of Lockport, plaintiffs have moved this court to grant the amendment of the complaint to include the 1974 Charter. However, this course of action is not necessary since the 1974 Charter is already part of the record in this case, and the United States Supreme Court has specifically directed us to consider it. The motion of the plaintiffs to amend the complaint is therefore denied.

The court rejects the Town of Lockport's mootness argument because the problem presented in this case is one which is capable of repetition yet evading review. *Moore v. Ogilvie,* 394 U.S. 814 (1969). If this court were to rule that the case is moot, there is a reasonable expectation that the wrong complained of by plaintiffs would be repeated, a consideration warranting against a holding of mootness. *United States v. W. T. Grant & Co.,* 345 U.S. 629, 633 (1953). Furthermore, the certification of the 1974 Charter has done nothing to diminish the definite and concrete nature of the controversy between the parties, and this controversy continues to touch upon the legal relations of the parties to this lawsuit who have adversed legal interests. Under *Aetna Life Ins. Co. v. Hawarth,* 300 U.S. 227, 240-241 (1937), this consideration warrants a finding that there still exists an actual case or controversy necessary for this court to retain jurisdiction and render a final determination. *U. S. Const. Art. III.*

For these reasons, the judgment of this court rendered on January 9, 1975 holding Article IX(1)(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York unconstitutional is hereby reinstated and in full force and effect. In addition, the January 9, 1975 judgment is hereby amended so that the 1974 Charter, which supersedes the 1972 Charter, is in full force and effect as the instrument defining the form of local government for Niagara County. It is further ordered that, pursuant to 28 U.S.C. § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the state court action.

I have conferred with the other members of the panel and they have given me authority to enter the present order and to sign for them. This order shall become effective upon filing,

and the parties may proceed further in accordance with the Rules of Federal Practice.

So ordered.

/s/ WILLIAM H. TIMBERS JTC
William H. Timbers
United States Circuit Judge

/s/ HAROLD P. BURKE JTC
Harold P. Burke
United States District Judge

/s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: October 23, 1975.

Judgment Entered December 15, 1975.

This cause having come on to be heard, on the 8th day of October, 1975 before the Honorable John T. Curtin, U.S.D.J., one of the members of a statutory three-judge district court, convened in this cause pursuant to 28 USC §§ 2281 and 2284 consisting of the Honorable William H. Timbers, Judge of the United States Court of Appeals for the Second Circuit and the Honorable Harold P. Burke and the Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, after a judgment of the identical Court granted the 9th day of January, 1975 was vacated by the Supreme Court of the United States in an order entered on the 6th day of October 1975 as follows:

The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provision of the new chapter (sic) adopted by Niagara County in 1974.

Now upon the order of the Supreme Court of the United States entered the 6th day of October 1975 and upon the documents filed in the Supreme Court of the United States including the briefs of all parties and a motion having been made by the plaintiffs-appellees to amend the complaint in the action to set forth a cause of action for declaratory and injunctive relief pertaining to the 1974 Niagara County Charter and upon the transcript of the oral argument of the attorneys for all parties to the action heard by the Honorable John T. Curtin, U.S.D.J., one of the members of the Special Statutory District Court on the 8th day of October 1975 at the United States Court House in Buffalo, New York at which time the plaintiffs-appellees were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach and Smythe of Buffalo, New York and the defendants-appellees Mario M. Cuomo, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney-General of the State of New York, Michael G. Wolfgang and Douglas J. Cream, assistant Attorneys-General, of counsel and La Verne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk, County of Niagara, New York were represented by Samuel L. Tavano, County Attorney, County of Niagara and the intervening defendants-appellants were represented by Victor T. Fuzak of the firm of Hodgson, Russ, Andrews, Woods, and Goodyear of Buffalo, New York and the court having considered the issues remand-

ed and an opinion having been signed and filed on the 23rd day of October 1975 written by the Honorable John T. Curtin, U.S.D.J., in which the Honorable William H. Timbers, U.S.D.J., and the Honorable Harold P. Burke, U.S.D.J., concurred and due deliberation having been had, it is therefore

ORDERED, ADJUDGED and DECREED that this cause is not moot and it is further

ORDERED, ADJUDGED and DECREED that the judgment rendered by this Court on the 9th day of January, 1975 be and it is hereby reinstated and it is further

ORDERED, ADJUDGED and DECREED that the judgment of this Court, as reinstated, be and it is hereby amended at the foot as follows:

ADJUDGED and DECREED that the 1974 County Charter, Local Law No. 2 of Niagara County for 1974, which supersedes the 1972 County Charter, Local Law No. 1 of Niagara County for 1972, is in full force and effect as the instrument defining the form of local government for Niagara County.

and it is further

ORDERED that pursuant to 28 USC § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the action in the Supreme Court of the State of New York entitled, "In the Matter of Town of Lockport, New York and one vs. Mario M Cuomo, Secretary of State of the State of New York *et al.* for judgment under CPLR Article 78", and it is further

ORDERED that the motion of the plaintiffs-appellees to grant an amendment to the plaintiffs' complaint to include the 1974 Charter be and it is hereby denied.

s/ WILLIAM H. TIMBERS, *USCJ*
William H. Timbers
United States Circuit Judge

s/ HAROLD P. BURKE, *USDJ*
Harold P. Burke
United States District Judge

s/ JOHN T. CURTIN, *USDJ*
John T. Curtin
United States District Judge

Dated: December 10, 1975.

Notice of Appeal, December 18, 1975.

Notice is here hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the judgment entered in this action on December 15, 1975 in the United States District Court for the Western District of New York reinstating, modifying and amending the judgment of said District Court entered on January 9, 1975 which declared Article IX, Section 1(h)(1), of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35c McKinney's Consolidated Laws of New York, Section 33 (7)] unconstitutional as being in

violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution; declaring a proposed Charter for Niagara County to be duly adopted; enjoining and directing the above-named Defendants to file and implement the Niagara County Charter set forth in Local Law No. 2 of 1974 for Niagara County; holding the action to be not moot; and enjoining the Intervening Defendants from proceeding with an action pending in the Supreme Court of the State of New York to restrain the implementation of proposed Local Law No. 2 of 1974. An appeal to this Court from the judgment entered on January 9, 1975 is pending under Docket No. 74-1390.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

Dated: Buffalo, New York, December 18, 1975.

s/ VICTOR T. FUZAK,
for
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
and
ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON,

Attorneys for Intervening Defendants.

UNITED STATES DISTRICT COURT
Western District of New York

COUNTY OF NIAGARA, NEW YORK,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

Civil Action No. Civ-1972-656.

FOR A FIRST CAUSE OF ACTION

I. JURISDICTION

1. The plaintiff is a duly constituted municipal corporation and a political subdivision of the State of New York, representing all the citizens and voters of the County of Niagara, with the county seat being located at Lockport, New York.

2. This is a civil action seeking declaratory injunctive and equitable relief in that the plaintiff is being deprived of its rights as secured by the Constitution of the United States of America, particularly Amendment V and Amendment XIV, Section 1, by the State of New York, pursuant to 28 United States Code, Section 1343.

II. THREE JUDGE COURT

3. This is a proper case for determination by a three judge court pursuant to 28 United States Code, Sections 2281 and 2284, since plaintiff seeks an injunction to restrain the enforcement, operation and execution of certain statutes and Constitutional provision of the State of New York which have statewide application on the grounds that said statutes and constitutional provision are violative of the United States Constitution.

III. VENUE

4. Venue is proper pursuant to 28 United States Code, Sections 1391 and 1392.

IV. FACTUAL ALLEGATIONS

5. On November 7, 1972, the electors of the County of Niagara voted on Proposition No. 5, a copy of which is annexed hereto and made a part hereof, marked as Exhibit "A", which proposed a county charter for the County of Niagara.

6. The vote on the proposed charter was as follows:

	For	*Against*
Cities	18,220	14,914
Towns	10,665	11,594
Totals	28,885	26,508

The Charter was not approved by all of the Towns of the County, considered as one voting unit.

7. The electors of the County approved the Charter by a plurality of 2,375 votes.

8. On the 1st day of December, 1972, pursuant to the applicable statutes for the certification of local laws, the

County Legislature of the County of Niagara certified to the Department of State of the State of New York that the proposed charter had received a majority of votes of the populace of the County of Niagara and offered the local law for filing with the Department of State.

9. On the 8th day of December, 1972, the Department of State of the State of New York returned the local law to the Clerk of the Niagara County Legislature with the advice that the certification was not proper since it did not certify that the proposed charter had received a majority of votes in the Towns of the County of Niagara considered as an independent unit.

10. The statute under which the State of New York rejected the proposed charter is Section 33 (7) of the Municipal Home Rule Law of the State of New York which provides as shown in Exhibit "B" annexed hereto and made a part hereof.

11. The defendant has contrasted the Municipal Home Rule Law, Section 33(7) to require that county charters must receive a majority of votes in all of the cities of a County voting as a unit, and all of the towns of the County voting as a unit, before it can be effective, regardless of the fact that it pass by a majority vote in the County of Niagara as a whole.

12. The proposed charter, a copy of which is annexed hereto and made a part hereof marked Exhibit "C", provides for an elective officer of County Executive, and County Comptroller among other provisions, and is effective January 1, 1973.

13. Under the Election Law of the State of New York and the regulations promulgated thereunder, primaries for said offices will be held on or about the 19th day of June, 1973.

14. Upon information and belief, the State of New York will not recognize any primary election resulting in a nomination of any person for those offices, based upon the defendant's rejection of the proposed charter for filing.

15. Likewise, the defendant will not recognize any person elected to those offices in the general election held in November, 1973.

16. Section 33(7) of the Municipal Home Rule Law was enacted pursuant to Article 9(h)(1) of the New York State Constitution.

17. The proposed charter of Niagara County does nothing more than enact a form of government for Niagara County without affecting the governments of any city, town or village contained in the County, and transfers no powers, duties or functions from or to any of them or to or from the County of Niagara.

FOR A SECOND CAUSE OF ACTION

18. The plaintiff realleges each and every allegation contained in paragraphs 1-17.

19. Upon information and belief, the said constitutional provision does not permit the New York State Legislature to enact a provision such as the Municipal Home Rule Law (7) requiring a separate passage of a charter by a majority vote in the cities and towns of the County of Niagara, unless there is a transfer of functions or duties to or from the County or the cities or the towns, pursuant to a proposed charter.

FOR A THIRD CAUSE OF ACTION

20. Plaintiff realleges each and every allegation contained in paragraphs 1-19.

21. In any event, if the Constitution of the State of New York is construed to permit such legislation, it is also repugnant to the Constitution of the United States as previously alleged.

FOR A FOURTH CAUSE OF ACTION

22. Plaintiff realleges each and every allegation contained in paragraphs 1-21.

23. Upon information and belief, the proper construction of Section 33(7) of the Municipal Home Rule Law is that separate majorities in cities and towns of the County are required only if functions or duties are transferred to or from those entities to the County, and there were no such transfers of functions or duties under the proposed Niagara County Charter.

IV. UNCONSTITUTIONALITY
CAUSES OF ACTION ONE AND TWO

24. The Municipal Home Rule Law, Section 33(7) and Article 9(h)(1) of the New York Constitution are unconstitutional if construed as done by the defendant because it weights the vote of a citizen of the city or the town so that a majority of the voters in the County cannot pass a charter which relates exclusively to county government, in violation of Amendment V, the due process clause, and the due process clauses and equal protective clause of Amendment 14 of the United States Constitution.

V. INJUNCTIVE RELIEF AND EQUITY

25. Unless preliminary and permanent injunctive relief is granted, the proposed Niagara County Charter cannot be

implemented in general and in the primary and general elections forthcoming, as previously alleged, the effective date of the charter being January 1, 1973. This will result in serious, immediate and irreparable injury in that the plaintiff will be deterred and prevented from exercising fully the most fundamental Federal constitutional right.

26. Plaintiff has no adequate remedy at law.

VI. RELIEF DEMANDED

WHEREFORE, the plaintiff requests the Court to convene a three judge court as soon as possible and cause the case to be preferred above others to be heard as soon as possible for the following relief.

1. Issue a declaratory judgment declaring that Municipal Home Rule Law Section 33(7) of the State of New York and Article 9(h)(1) of the New York State Constitution are null and void on their face as applied to the plaintiff, as violative of the United States Constitution, and

2. Preliminarily and permanently enjoin and restrain the defendant, its agents, employees, or all those acting for them or at its direction, from excercising or doing anything to prevent the adoption or implementation of the proposed Niagara County Charter, and

3. Allow plaintiff costs and such other relief as to the Court seems necessary, equitable and just.

Dated: December 14, 1972.

MILES A. LANCE,

SAMUEL L. TAVANO,
Niagara County Attorney,
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT

Western District of New York

COUNTY OF NIAGARA, NEW YORK,

Plaintiff,

vs.

STATE OF NEW YORK,

Defendant.

Civil 1972-656

Appearances:

Samuel L. Tavano, Niagara County Attorney (Miles A. Lance, Assistant County Attorney, of Counsel), Lockport, New York, for Plaintiff.

Louis J. Lefkowitz, Attorney General of the State of New York, (William J. Kogan, Assistant Attorney General, of Counsel), Albany, New York, for Defendant.

Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9(h)(1) of the New York

State Constitution and section 33(7) of the Municipal Home Rule Law of the State of New York. Because the claim directs a constitutional attack upon a state constitutional provision and a state statute plaintiff also asks that a three judge court be convened, pursuant to 28 United States Code, section 2281. Defendant has moved to dismiss the complaint.

This case arose out of a referendum held at the November 7, 1972 elections in which a proposed new county charter was presented to the voters of Niagara County. The proposed charter would amend the present form of government in Niagara County by creating the offices of county executive and county controller, and by extending the term of office of county legislators from two to four years. Although the county-wide vote resulted in a majority in favor of adoption of the proposed charter, the vote in the areas outside the cities, when taken as a unit, resulted in a majority against the adoption of the proposed charter.

In December, 1972 the new charter was presented to The Secretary of State of the State of New York for filing. The Secretary of State refused to file the new charter because County of Niagara officials could not certify that it had been passed by a majority vote both in the cities of the county and in the area outside the cities, each considered as an independent unit. This action was taken by the Secretary of State pursuant to section 33 of the Municipal Home Rule Law, Subdivision 7, which provides as follows:

> 7. A charter law
>
> (a) providing a county charter, or
>
> (b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a

> city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter . . . . If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit . . . .

This statute was enacted pursuant to Article 9, Section 1, subdivision (h)(1) of the New York State Constitution, which provides:

> "(h)(1) Counties, . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government. . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

Plaintiff contends (1) that section 33 (7) of the municipal Home Rule Law was enacted in violation of Article 9(h)(1) of

the New York State Constitution, since the state constitution did not contemplate that separate majorities would be required to adopt a new charter that did not provide for a transfer of functions to or from the county or the cities or the towns; (2) that even if the state constitution is construed to permit such legislation, both the state constitutional provision and the section of the Municipal Home Rule Law in question violate the due process and equal protection clauses of the United States Constitution, as interpreted by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, and subsequent cases; (3) even if both the state constitutional provision and the state statute are held to be constitutional, the proper construction of section 33(7) of the Municipal Home Rule Law is that separate majorities in cities and areas outside the cities are required only if functions or duties are transferred to or from those entities to the county by provisions of the proposed charter.

With regard to plaintiff's second claim, it is true that in *Baker v. Carr, Id.*, and in subsequent cases the Supreme Court set forth the principle that in statewide and congressional elections, one person's vote must be counted equally with those of all other voters in a state. See, *Gray v. Sanders*, 372 U.S. 368; *Wesberry v. Sanders*, 376 U.S. 1; *Reynolds v. Sims*, 377 U.S. 533. However, the one man one vote concept is not without its limits. In *Wells v. Edwards*, 41 U.S.L.W. 3370 (U.S. Jan. 9, 1973) the court refused to apply the concept of one man one vote to the establishment of districts for the election of judges.

This case deals with a referendum held for the purpose of obtaining voter approval of a new form of county government. A county, being a political subdivision of a state, is, in a sense, a creature of that state. *cf. Trenton v. New Jersey*, 262

U.S. 182. The State of New York has adopted a constitutional provision allowing counties within the state to create alternate forms of government. The New York State legislature has acted to implement that state constitutional provisions by enacting the Municipal Home Rule Law, which further spells out the procedures to be followed by a county in adopting a new form of government. The State of New York was acting within its sovereign power in adopting the constitutional and statutory provisions referred to above. Where a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *Gomillion v. Lightfoot,* 364 U.S. 339, 347 (1960).

Title 28, United States Code section 2281 does not require the convening of a three judge court when the constitutional attack upon a state statute is insubstantial. *Bailey v. Patterson,* 369 U.S. 31; *Goosby v. Osser,* 41 U.S.L.W. 4167 (U.S. Jan. 17, 1973). The facts presented by this case do not raise a substantial federal question.

In light of the foregoing, this court does not reach the other contentions of the Plaintiff. Plaintiff's motion to convene a three-judge court is denied. The motion of Defendant to dismiss is granted.

It is so ordered.

JOHN O. HENDERSON,
United States District Judge.

Dated: April 3, 1973.

Affidavit of Plaintiff for Correction of Record (July 1, 1976).

(Amended Title.)

FRANCIS W. SHEDD, Being duly sworn deposes and says:

1. That he is a plaintiff-appellee in the within action and is the voter of Niagara County who brought this class action individually and on behalf of the class of voters who voted in favor of the County Charter form of local government for Niagara County.

2. That your deponent has read the affidavit that his attorney John J. Phelan prepared and swore to on August 3, 1973 upon information and belief obtained from your deponent. That the date of your deponent's appearance before the Niagara County legislature is stated in Mr. Phelan's affidavit to have been on May 4, 1973. That said fact is erroneous. Your deponent appeared before the Niagara County legislature on May 1, 1973, and the events are hereafter described and documented by newspaper reports.

3. That on May 1, 1973 your deponent appeared before the Niagara County legislature at a regular meeting thereof and advised the members thereof that he was a voter of the City of Niagara Falls, New York; that he had voted in favor of the proposition for the adoption of the Niagara County Charter; that it was his contention that he was an aggrieved voter who had been deprived of his right of equal suffrage guaranteed by the Fourteenth Amendment of the United States Constitution; that he intended to intervene in the pending action and to move to amend the complaint or to commence a separate class action forthwith for a declaratory judgment and a determination of whether the constitutional rights of the voters of Niagara County to equal protection pursuant to the Fourteenth Amendment had been violated

and to join such action with the pending action, and he requested and urged the Niagara County Legislature not to permit the order of dismissal granted by the Honorable John O. Henderson, U.S.D.J. on April 3, 1973 to become final and further requested the Niagara County Legislature to direct its County Attorney to file a notice of appeal.

4. That on that date, May 1, 1973 the Niagara County Legislature, in session, declined to direct the Niagara County Attorney to file a notice of appeal and in fact no notice of appeal was ever filed.

5. That your deponent's appearance before the Niagara County legislature was reported in the press on May 2, 1973, specifically in the Buffalo Courier Express, Buffalo, New York, a copy of which article is annexed to the within affidavit and designated Exhibit A.

6. That your deponent respectfully requests this Court to authorize the inclusion of this affidavit as part of the record of the within action and to authorize its filing in the office of the Clerk of the U.S. District Court for the Western District and to authorize its transmittal to the Clerk of the Supreme Court of the United States for inclusion with the record and to authorize the inclusion of the within affidavit in the joint appendix together with such other and further relief as this Court may deem just and proper.

FRANCIS W. SHEDD.

(Sworn to July 1, 1976.)

Exhibit A.

Buffalo Courier-Express, Wednesday, May 2, 1973

LEGISLATORS BALK ON CHARTER ACTION

Courier-Express Lockport Bureau

LOCKPORT—The Niagara County Legislature Tuesday refused to take further action on a county charter which was rejected by the state even though it was approved by the majority of voters last November.

The county charter was approved on a Countywide basis by 1,500 votes last November.

The charter was ruled invalid by the state however because it was defeated by the voters of the county's 12 towns as a total unit. Voters in the county's three cities approved the charter by enough of a majority to overcome the town results.

State officials ruled that both the cities and towns had to approve the charter as units.

The county appealed the state's decision but Federal Judge John O. Henderson ruled last month that the county had no grounds for federal action.

Francis W. Shedd, a Niagara Falls lawyer who is a member of the State Joint Legislative Committee, said he is planning to institute a suit to test the constitutionality of the state charter which requires a dual referendum on the charter vote.

He said he is taking the action as an aggrieved voter.

Shedd asked that the county file an appeal to Judge Henderson's decision by Thursday, the county's deadline for making the appeal. He added that if the county did not wish to file the appeal by Thursday, then it could ask for a 30-day extension on the appeal deadline.

Shedd said he would like the county to continue the appeal so that he could get in on the "ground floor" of the matter.

Shedd served as counsel to the Joint Legislative Committee on Metropolitan and Regional Areas Studies.

Shedd will be represented in his suit by John Phelan, a Buffalo lawyer who for many years served as chief counsel to former State Sen. Earl W. Brydges of Niagara Falls.

Several members of the county legislature questioned Shedd on the matter.

The Legislature then tabled a motion presented by Legislator Louis E. Caggiano, of Niagara Falls, asking that a new charter commission be formed and that the Legislature go on record opposing the double referendum issue.

Another motion made by Legislator Fremont Ferchen, Town of Wheatfield asking simply that a new charter commission be formed, died on the floor when it did not receive a second.

In other matters Tuesday the Legislature:

—Refused to accept a motion presented by Caggiano asking that the county's Social Services Dept. be forbidden to provide payment for abortions for women who are receiving public assistance. No action was taken on the matter because the resolution was not filed in time to be placed on the meeting's agency. County Attorney Samuel L. Tavano also warned legislators that the motion would probably be ruled illegal because of the question of constitutionality.

—Heard a detailed report from Col. Robert Moore, head of the Buffalo office of the U.S. Army Corps of Engineers, concerning the proposed All-American Canal which would run through the county. Col. Moore said the estimated construction cost of the canal will be about $1.5 billion. The canal would be paid for with federal funds.

—Designated the City of Niagara Falls Dept. of Manpower as the official agency of the county's Manpower Training program.

District Court July 2, 1976 Order Correcting Record.

(Amended Title.)

A motion having been made for an Order authorizing the inclusion in the record of the proceedings in this action of an affidavit of plaintiff-appellee, Francis W. Shedd, sworn to July 1, 1976 to correct an alleged error of fact in the record of the proceedings in this action and said motion having come on duly to be heard,

NOW upon reading and filing the notice of motion dated July 1, 1976, the affidavit of Francis W. Shedd, sworn to July 1, 1976, the affidavit of John J. Phelan, attorney at law, sworn to July 1, 1976 and Moot, Sprague, Marcy, Landy, Fernbach & Smythe, attorneys for the plaintiff-appellees, John J. Phelan, of counsel, having appeared in support of the motion and Victor T. Fuzak, attorney for the intervenor-appellants, Town of Lockport, New York and Floyd Snyder, having advised the Court that he was not opposing the motion and due deliberation having been had, it is hereby

ORDERED that the motion be, and it hereby is granted and the affidavit of Francis W. Shedd, sworn to July 1, 1976 is ordered to be included in the record of the porceedings in this action: to be filed with this Order in the office of the Clerk of

the United States District Court for the Western District of New York and to be transmitted to the office of the Clerk of the Supreme Court of the United States as part of the proceedings in this action; and said affidavit and this Order is authorized to be included in the joint appendix on the appeal to the Supreme Court of the United States as part of the cross-designation of the appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd.

JOHN T. CURTIN,
U.S.D.J.

July 2, 1976.

75-1157

IN THE

Supreme Court of the United States

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER,
Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.
and FRANCIS W. SHEDD, Individually and on Behalf of
All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, WHITNEY T. BARNUM, (successor to LaVerne S. Graf), Clerk of the Niagara Co... Legislature, County of Niagara, New York, and RAYMOND A. BEITER, (successor to Kenneth Comerford), County Clerk of the County of Niagara, New York,
Appellees.

MOTION TO AFFIRM AND BRIEF OF APPELLEES

JOHN V. SIMON,
Niagara County Attorney,

MILES A. LANCE,
Assistant County Attorney—
of counsel,
Niagara County Court House,
Lockport, New York 14094,

Attorneys for Appellees,
Whitney Barnum and
Raymond A. Beiter.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
716-343-0457

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CASES CITED.

STATUTES.

RULES.

CONSTITUTIONS.

IN THE

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TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

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Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, WHITNEY E. BARNUM, (successor to LaVerne S. Graf), Clerk of the Niagara County Legislature, County of Niagara, New York, and RAYMOND A. BEITER, (successor to Kenneth Comerford), County Clerk of the County of Niagara, New York,

Appellees.

Motion to Affirm

Appellees, the Clerk of the Niagara County Legislature and County Clerk of the County of Niagara, pursuant to Rule 16 (d) of the Rules of the Supreme Court of the United States, move to affirm the final judgment of the District Court on the ground that the decision of the District Court is unquestionably correct under the principles of laws established by the United States Supreme Court as to warrant no further review of the Supreme Court.

Questions Presented

The Appellants present in their Jurisdictional Statement certain questions which Appellees believe should be decided as follows:

A. These Appellees contend that this case is not moot since the 1974 Charter is now part of the District Court's Judgment. It is the operative form of government for Niagara County and has been since January 1, 1976. A County Executive has been elected and is currently administering Niagara County Government and implementing all the provisions of the 1974 Charter.

B. It has always been the position of these Appellees that the Judgment regarding the 1972 Charter was applicable to the 1974 Charter and these Appellees made a motion to amend the District Court's Judgment to so consider the 1974 Charter, which motion was denied by the District Court. The United States Supreme Court subsequently directed the District Court to consider the 1974 Charter on remand, which was done, and the 1974 Charter was then made part of the District Court's decision and upheld.

C. It is the position of these Appellees that *28 U.S.C., Section 2283* gives the United States District Court authority to protect its judgment by the issuance of an injunction against State Court's action. The action restrained were appeals to the Appellate Division, New York State Supreme Court or Court of Appeals from a result in the State Supreme Court fully agreeing with the District Court's decision.

D. It is the position of these Appellees that the District Court's Judgment should be affirmed since the creation of dual voting units of unequal population and the requirement of separate majorities in each such unit violates

the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and that this proposition is so clear that there need be no further proceedings by this Court except to affirm without argument.

Statement of Case

In November, 1972, a Charter was placed on the ballot for Niagara County and the following vote was had:

	For	*Against*
Cities	18,220	14,914
Towns	10,665	11,594
Totals	28,885	26,508

In November, 1974, a Charter was placed on the ballot for Niagara County and the following vote was had:

	For	*Against*
Cities	11,305	9,222
Towns	8,059	8,222
Totals	19,364	17,444

Both Charters were passed by majority of the persons voting in the referendum. In the 1974 Charter there were the following provisions:

> "Section 103. *Charter Effect on State Laws.* This charter provides a form and structure of County Government in accordance with the provisions of the Municipal Home Rule Law of the State of New York, and all special laws relating to Niagara County and all general laws of the State of New York, shall continue in full force and effect except to the extent that such laws have been repealed, amended, modified or superseded in their application to Niagara County by enactment and adoption of this charter and code. Within the limitations prescribed in said Municipal Home Rule

Law wherever and whenever any state law, general, special or local in effect, conflicts with this charter or the code or is inconsistent therewith, such law shall be deemed to the extent of such conflict or inconsistency, to be superseded by this charter and code insofar as the County of Niagara and its government are affected.

Section 104. *Charter Effect on Local Laws, and Resolutions.* All local laws and resolutions of the Legislature of the County of Niagara heretofore adopted, and all of the laws of the State relating to the Towns, Cities, Villages or Districts of the County of Niagara, shall continue in full force and effect except to the extent that such laws have been repealed, amended, modified or superseded in their application to Niagara County by the enactment and adoption of this charter and code.

Section 105. *Local Government Functions, Facilities & Powers Not Transferred, Altered or Impaired.* No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code."

These Appellees were not prevented by a Judgment concerning the 1972 Charter from adopting a new or different Charter which was done, pending the decision of the 1972 Charter, nor thereafter.

Article 9, Section 1(h)(1) of the New York State Constitution reads as follows:

> "Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit."

Section 33, Subdivision (7) of the Municipal Home Rule Law of the State of New York which implements *Article 9, Section 1(h)(1) of the New York State Constitution,* reads as follows:

> "A charter law
>
> (a) providing a county charter, or
>
> (b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or, in the counties of Dutchess, Orange and Chautauqua, at a special election, held in the county by receiving a majority

of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a county charter or charter law shall provide for its submission to the electors of the county at the next general election or, in the counties of Dutchess, Orange and Chautauqua, at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof."

These Sections were interpreted by the State of New York to require a dual referendum and majority vote, the cities voting as a group, and the towns voting as a group.

The quintessential question is whether the State Constitution and its implementing statute can provide a veto power by the cities of a county voting as a group, and likewise a veto power by the towns of the County voting as a group, where the majority of the voters of the County have adopted a Charter, such Charter affecting all citizens of the County equally in its impact on their lives.

Clearly there is no question of fact for the Court to decide. There is a pure question of law as to whether *Article 9, Section 1(h)(1) of the New York State Constitution,* and *Section 33, Subdivision (7) of the Municipal Home Rule Law* are permissible under the Fourteenth

Amendment of the United States Constitution, regarding the Equal Protection Clause. Therefore, no hearing or trial is necessary.

This was the same question before the District Court in the decision concerning the 1972 Charter.

POINT I

The District Court had jurisdiction to render a decision concerning the 1974 Charter and validating it as part of its prior judgment concerning the 1972 Charter.

The District Court had before it on October 6, 1975 the following Order of the United States Supreme Court:

> "The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new chapter (sic) adopted by Niagara County in 1974."

On January 9, 1975, a new judgment pertaining to the 1974 Charter was entered, again considering the pure constitutionality of the 1974 Charter, in light of *Article 9, Section 1(h)(1) of the New York State Constitution* and *Section 33, Subdivision (7) of the Municipal Home Rule Law,* enunciated above, and did so, upholding the 1974 Charter.

If Appellants wished to challenge the United States Supreme Court's determination to remand, an application to reargue or submit the matter should have been made pursuant to Rule 58 of the Rules of the United States Supreme Court.

POINT II

The District Court's decision upholding the 1974 Charter was constitutionally valid.

There can be no doubt that one set of political subdivisions cannot be given a veto power over others, where all citizens are equally affected, within the rule of *Gray vs. Sanders,* 372 U. S. 368, 83 S. Ct. 801 (1963), as further elucidated in other cases discussed by the District Court in its decision on the 1972 Charter. To hold otherwise would be to institute a system of weighted voting between individual citizens for the purposes of legislating a political status quo; a concept which defies all notions of democracy. While such a plan may be good local politics, it is constitutionally impermissible and is founded upon no known rational basis. Further, such a constitutional and statutory scheme discriminates against persons because of race or color, given the differing composition of population of cities and towns in Niagara County as found in census statistics readily available.

POINT III

The District Court's injunction did not impermissibly interfere with the New York State Courts.

In *Huffman vs. Persue,* 43 L. Ed. 2d 482 (1975), relied upon by Appellants, the United States Supreme Court has apparently left open the question of Federal Court injunctions of State Civil proceedings. Even using the rule urged on the Courts by the Appellants requiring a showing of extraordinary circumstances, the injunction was proper. The Federal rights to be protected by the District Court's decision are so clear that there is no rational

basis for any State Court to be allowed to proceed with appeals. Appellants stratagem is to use dilatory tactics. The question of procedural defects under State Law was resolved summarily in favor of the Appellees by the New York State Supreme Court and the State Attorney General was in full agreement with this Judgment. The Secretary of State of the State of New York has duly certified the 1974 Charter. Furthermore, the Appellants had a full opportunity to raise such issues in the Federal District Court upon remand and chose not to do so.

POINT IV

The Judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN V. SIMON,
Niagara County Attorney,

MILES A. LANCE,
Assistant County Attorney—
of counsel,
Niagara County Court House,
Lockport, New York 14094,

Attorneys for Appellees,
Whitney Barnum and
Raymond A. Beiter.

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM
AND
BRIEF OF APPELLEES, CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. AND FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated

WELLES V. MOOT,
and
JOHN J. PHELAN,
2300 Erie County Savings Bank Building,
Two Main Place,
Buffalo, New York,
for
MOOT, SPRAGUE, MARCY, LANDY, FERNBACH & SMYTHE,
Buffalo, New York,
Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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IN THE

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October Term, 1974
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Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York, and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Appellees.

Appeal From A Three Judge Court Of The United States District Court for The Western District of New York

MOTION TO AFFIRM

Appellees, Citizens for Community Action at the Local Level, Inc., (hereinafter referred to as appellee CALL) and Francis W. Shedd, pursuant to Rule 16 Subd. 1(d) of the Rules of the Supreme Court move to affirm the judgment of the District Court granted December 10, 1975,

which reinstated the judgment of January 9, 1975 and amended it to adjudge the 1974 County Charter to be in full force and effect and granted additional relief, on the ground that the decision of the District Court is so obviously correct under the principles established by this Court as to warrant no further review by this Court.

BRIEF OF APPELLEES

Opinion Below

The opinion of the District Court for the Western District of New York dated October 23, 1975 that the judgment of January 9, 1975 should be reinstated and amended appears as appendix 1, pages 1a-7a in the Jurisdictional Statement filed in February, 1976. The opinion declaring the constitutional rights of the plaintiffs-appellees is contained in Appendix A, pp. 1a-17a in the original Jurisdictional Statement and is reported at 386 F.Supp. 1.

Jurisdiction

The jurisdictional requisites are adequately set forth in the appellants' Jurisdictional Statement.

Constitutional and Statutory Provisions Involved

The Jurisdictional Statement sets forth the Constitutional and Statutory Provisions Involved.

Questions Presented

The principal question on this appeal is the one man—one vote question which is set forth in the plaintiffs-appellees' motion to affirm and brief filed in May 1975 (p. 2). An additional question presented as a result of the

vacatur and remand by this Court and the reinstatement and amendment of the judgment by the District Court is:

> Did the District Court have the authority to give the 1974 Charter force and effect, pursuant to the direction of this Court to reconsider the case in light of the 1974 Charter, or in accordance with equitable principles, to implement voting rights in light of local conditions.

Statement of Case

The statement of case contained in the motion to affirm and brief of appellees CALL and Shedd of May, 1975 is incorporated herein.

On October 6, 1975 this Court vacated the judgment and returned the case to the District Court for reconsideration in light of the 1974 Charter.

The District Court heard oral argument of counsel, received the 1974 Charter as an exhibit and found as a fact that the 1972 and 1974 Charters were similar and that each Charter was approved by a majority of the voters of Niagara County, with a majority of city voters but a minority in the rural areas. The Court then reinstated the previous judgment and gave the 1974 Charter force and effect as the form of local government for Niagara County.

The appellants make factual allegations in the Statement of Case which we believe are irrelevant as well as erroneous, but we hesitate to leave such allegations unanswered. For that reason, we comment on them in the same position in this brief.

The appellants contend that prior to entry of the January 9, 1975 judgment, the District Court refused to apply

the declaration of constitutional rights to the 1974 Charter. This contention is found throughout the Jurisdictional Statement of February, 1976 (PP. 4, 6, 8 & 9). It is not true. The Niagara County Attorney in a letter in December, 1974 (Appendix A) requested a stipulation to incorporate the 1974 Charter into the judgment. The plaintiff class of voters agreed. The New York Attorney-General declined to stipulate. The matter was never the subject of a proper application to the District Court. The District Court made no determination as to the 1974 Charter at that time or any other time prior to the decision of October 23, 1975.

In addition, the appellants repeatedly contend (Jurisdictional Statement PP. 7, 8, 9) that the plaintiffs-appellees conceded that the complaint required amendment to authorize implementation of the 1974 Charter. That allegation is not true.

The plaintiffs-appellees urged the District Court to adopt one of three alternative methods to protect the voters' constitutional rights; (a) order the implementation of the 1974 Charter in the exercise of its equitable power; (b) order the implementation of the 1972 Charter and with the 1974 Charter voluntarily certified by the New York Secretary of State and the Niagara County Clerk, the superseding clause of the 1974 Charter would give the 1974 Charter force and effect; (c) amend the complaint to set forth an additional cause of action to enjoin implementation of the 1974 Charter and re-litigate the suit from the pleading stage.

The District Court decided that neither course of action was necessary since the 1974 Charter was already part of the record in this case, and this Court had specifically directed the District Court to consider the 1974 Charter.

The motion of the plaintiffs to amend the complaint was therefore denied. The appellants, however, did not appeal such denial of the motion of the plaintiffs-appellees by the District Court.

I

The District Court gave expression to the equal suffrage rights of the voters of Niagara County by implementing the 1974 Charter.

The decision of the District Court to implement the 1974 Charter, upon finding that the same constitutional issues were involved and the Charters were substantially similar is reasonable and is an exercise of the equitable power to grant relief which is given to District Courts in cases of this nature.

The power is derived from Rule 54(c) FRCP which provides "that every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The District Court had broad discretion in framing the equitable decree to apply the constitutional principle to the 1974 County Charter in accordance with the FRCP. *6 Moore's Federal Practice*, §§ 54.60-54.62.

Once a constitutional right and a violation have been shown, the scope of the District Court's power to remedy the wrong is broad, for breadth and flexibility are inherent in equitable remedies. *Swann vs. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276 (1971).

In *The Hecht Co. vs. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 592 (1944) this Court stated:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

The application of equity principles in equal suffrage cases was recognized at the outset of the judicial enforcement of such rights.

Baker vs. Carr, 369 U.S. 186, 250; 82 S.Ct. 691, 727 (1962) referred to the question:

> The justifiability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.

In *Reynolds vs. Sims,* 377 U.S. 533, 585; 84 S.Ct. 1363, 1393 (1964), it is stated:

> Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.

II

There was no appeal from that portion of the order and judgment of the District Court denying the motion to amend the complaint to include the 1974 Charter. The judgment of the District Court on that question should be final.

The last paragraph of the amended judgment of the District Court, which denied the motion to amend the complaint to include the 1974 Charter, was not appealed from.

The appellant was apparently attempting to raise the issue of subject matter jurisdiction in this Court (Point II of the Jurisdictional Statement) without a review of the decision of the District Court to deny such motion.

We submit that the failure of the appellant to appeal from the District Court's order on the question of the necessity for an amendment of the complaint precludes any further review of that question.

III

This case is not moot.

The 1974 County Charter which went into effect on January 1, 1976 and the Niagara County Executive who took office on that date are dependent for their continued existence upon an affirmance by this Court. A case or controversy under Article III of the United States Constitution exists.

Article 9 §1(h)(1)of the New York Constitution which the District Court has found to violate the right of equal suffrage guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution is still contained in the New York Constitution. The violation of equal suffrage rights which the District Court has undertaken to declare is capable of repetition. *Moore vs. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493 (1969); *United States vs. W.T. Grant & Co.,* 345 U.S. 629, 73 S.Ct. 894 (1953); *Aetna Life Insurance Co. vs. Hawarth,* 300 U.S. 227, 240-241, 57 S.Ct. 461 (1937).

IV

The attempt by the intervenor appellants to create a collateral issue by challenging the stay of the state court proceeding should be disregarded.

This federal court action involving a fundamental federal constitutional issue had been tried to judgment in District Court with the aggrieved voters the principal

protagonists, six months before the state court action was commenced by the appellants and in which state proceeding, the aggrieved class of voters were not made parties.

Further, the intervenor appellants were permitted to intervene after judgment in the District Court because they claimed they would seek a determination in this Court of the fundamental constitutional issue.

28 USC § 2283 was designed to prevent unseemly and unnecessary conflicts between state and federal courts and for comity in a proper case. *NLRB vs. Nash-Finch Company,* 404 U.S. 138, 146, 92 S.Ct. 373, 378 (1971). The state court judge reached his decision by relying totally upon the District Court decision in this case. This is a proper case when a stay pursuant to 28 USC § 2283 is appropriate until this Court determines the merits of this Fourteenth Amendment question.

Conclusion

The decision of the three-judge District Court applied fundamental principles of equal suffrage to a state's classification of voters into voting units of unequal population, based upon place of residence, within the geographic area of a unit of local government having general governmental powers. There was no evidence in the case of the necessity or justification for the creation of such voting units within the geographic area in which the election franchise was granted.

The decree of the District Court giving the 1974 Charter full force and effect as the instrument defining the form of local government for Niagara County is the most effective implementation of the voters' expression of their rights of equal suffrage under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The judgment of the District Court as reinstated and amended should be affirmed without plenary consideration.

Respectfully submitted,

WELLES V. MOOT, ESQ.,
and
JOHN J. PHELAN, ESQ.,
Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

April, 1976.

APPENDIX A

Letter of Niagara County Attorney to District Court prior to judgment of 1-9-75.

December 10, 1974

Honorable John T. Curtin
United States District Judge
United States District Court
Western District of New York
United States Courthouse
Niagara Square
Buffalo, New York 14202

Re: Citizens For Community Action At The Local Level, Inc. et al vs. John J. Ghezzi, Secretary of State of the State of New York, et al, CIV-1973-222

Dear Judge Curtin:

This letter is to set forth the position of the County of Niagara in the matter of settling the order in this action. Enclosed is a certification of our Board of Elections showing that a charter was passed at the general election in 1974, and a copy of the Local Law with the certification of the Clerk of the Legislature and the County Attorney. The Local Law is the text of the charter passed in 1974. Also enclosed is a copy of the letter from the Secretary of State rejecting the filing of said 1974 charter.

We feel it would save much time, effort and money if the adjudgment of the Court could be amended to include the 1974 charter, allowing the State Attorney General's office to appeal from the 1972 charter passage and the 1974 charter passage. The 1974 charter contains a provi-

sion which indicates that it supercedes any and all other prior charters (see Article I, Section 101, 1974 charter).

I would suggest the Court could take judicial notice of the documents we now submit. It is also a possibility that we could proceed by way of stipulation. I will ask the other attorneys to stipulate to this method of entering judgment.

Very truly yours,

SAMUEL L. TAVANO,
County Attorney,

MILES A. LANCE,
Assistant County Attorney.

MAL:mlc

cc: John J. Phelan, Esq.,
Michael G. Wolfgang, Esq.

Enc.

(G-62)

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

RESPONSE OF JOHN J. GHEZZI AND ARTHUR LEVITT TO APPELLANTS' JURISDICTIONAL STATEMENT

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Appellees.

RESPONSE OF JOHN J. GHEZZI AND ARTHUR LEVITT TO APPELLANTS' JURISDICTIONAL STATEMENT

Preliminary Statement

On February 17, 1976 an appeal was docketed in this Court (Docket No. 75-1157) from a judgment of a statutory three-judge District Court sitting for the Western

District of New York. That judgment, in *Citizens for Community Action at the Local Level, Inc., et al.* v. *John J. Ghezzi, etc., et al.*, Civ-1973-222 amended and reinstated its previous judgment in the same case entered January 19, 1975. 361 F. Supp. 1 (W.D.N.Y. 1974).

The action commenced against the Clerk of the Niagara County Legislature and the Niagara County Clerk as well as the Secretary of State of the State of New York and the Comptroller of the State of New York, sought a declaration that the portions of the New York State Constitution and statutory provisions governing the procedure for the adoption of a new charter for county government were in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. That procedure requires a majority of the total votes cast in both the area of the county outside of cities and in the area of the cities of the county. In brief, the violation sought to be declared was that the fundamental right of equal suffrage guaranteed by the Equal Protection Clause or "one man—one vote" had been violated.

The January 1975 judgment declared unconstitutional Article IX, § 1(h)(1) of the Constitution of the State of New York and section 33(7) of the Municipal Home Rule Law. Additionally, injunctive relief was granted by the District Court requiring the filing and implementation of the Niagara County Charter which was passed by a majority of the voters in a referendum held November 7, 1972.

Appellants appealed that judgment (Docket No. 74-1390), and asked this Court to vacate the judgment on the grounds of mootness. The 1972 Charter ordered implemented by the District Court had been supplanted by a Charter passed by a majority of the Niagara County voters in November of 1974.

Appellants argued that the subject matter of the January judgment was the 1972 Charter; since that Charter was never implemented and was now a nullity, the judgment of the District Court was moot.

This Court, by order entered October 6, 1975 in Case No. 74-1390 vacated the January 1975 judgment of the District Court and remanded the cause for reconsideration in light of the provisions of the new Charter adopted by Niagara County in 1974.

The District Court rejected appellants' mootness arguments, amended its judgment to hold that the 1974 Charter

> "be in full force and effect as the instrument defining the form of local government for Niagara County . . ."

and reinstated its prior (January) judgment.

Since January of 1976, when the Niagara County Charter became operative, the County has been functioning pursuant to that Charter.

A County Executive has been elected as have other County officials and all are presently discharging the duties of their offices as prescribed by the Charter. Niagara County has incurred debts, pledged its credit, contracted for services, embarked upon public works, and continues to proceed with its business pursuant to its Charter form of government.

The New York State defendants, John J. Ghezzi, Secretary of State (at the time the suits were filed), and Arthur Levitt, Comptroller, did not appeal from the January judgment nor do they appeal from the December judgment.

However, by letter dated April 28, 1976, the Clerk of the Court conveyed the Court's request for the New York State defendants' response to the appeal.

This response is submitted pursuant to that request.

In response to appellants' Jurisdictional Statement, appellees Whitney E. Barnum, Clerk of the Niagara County Legislature, and Raymond A. Beiter, County Clerk of the County of Niagara have moved this Court for an order affirming the judgment of the District Court. Appellees Citizens for Community Action and Francis W. Shedd have similarly moved.

Questions Presented

Appellants' Jurisdictional Statement in Docket No. 74-1390 (referred to by appellants as their "original Jurisdictional Statement") set forth the essential question on their appeal. That Question is adopted by reference in their Second Jurisdictional Statement (Docket No. 75-1157) p. 5. It is the question before this Court in this case, *viz.*:

> "The New York State Constitution and the New York Municipal Home Rule Law provide that the adoption, amendment or repeal of a county charter must be approved in referendum by a majority of those voting in areas outside of the cities in the county and by a majority of those voting in the cities within the county."
>
> "Do these provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?"

Constitutional and Statutory Provisions Involved

Constitution of the United States—Amendment XI:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

New York State Constitution, Article IX, § 1, subdivision (h)(1):

> "Counties * * * shall be empowered by general law * * * to adopt * * * alternative forms of county government provided by the legislature * * *. Any such form of government * * * may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment * * * shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of the cities, and in the cities of the county, if any, considered as one unit."

Municipal Home Rule Law, § 33, subdivision 7(b):

> "* * * If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit * * *".

ARGUMENT

The creation of separate voting units and the requirement of a double referendum in Article IX, § 1 (h) (1) of the New York State Constitution and Section 33(7) of the New York Municipal Home Rule Law is a valid exercise of the State's sovereign powers and not in violation of the fundamental right of equal suffrage guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

The sovereign right of a state to create political subdivisions to assist it in carrying out state governmental functions is well recognized. *Trenton* v. *New Jersey,* 262 U.S. 182 (1923). *Hunter* v. *Pittsburgh,* 207 U.S. 161 (1907) and *Williams* v. *Eggleston,* 170 U.S. 304 (1898). That right and authority extends to the establishment, modification or abolition of local government units and structures. As the Court unanimously observed in *Gormillion* v. *Lightfoot,* 364 U.S. 339 (1960), the creation by the State of its municipalities is "clearly a political act."

The court below seeks to enlarge and extend the "one man, one vote" rule of *Baker* v. *Carr,* 369 U.S. 186 (1962) and *Reynolds* v. *Sims,* 377 U.S. 533 (1964) to inhibit the establishment of a state's subordinate governmental units. The principle of "one man, one vote" is not without limits. It has been invoked in only the election of governmental representatives with the exception of two cases relating to the approval of general obligation bonds. *City of Phoenix, Arizona* v. *Kolodziejski,* 399 U.S. 204 (1969), and to the approval of revenue bonds, *Cipriano* v. *City of Hooma,* 395 U.S. 701 (1968).

In both *Phoenix* and *Cipriano,* the Court was offended because non-property owners were disenfranchised from voting in elections relating to the approval of bonds. In each case the Court found that elected representatives were pledging the credit of a larger number of people than those entitled to vote in the referendum. Both cases involved the derrogation of otherwise qualified voters in that they were being taxed without being equally represented.

The issue here presented to the electorate in the referendums complained of was not that of representation but that of form of government. The interest of the separate geographic locations was properly taken into account by the state in the exercise of its sovereign powers to form units of local government. In *Saylor* v. Tulare *Lake Basin Water Storage District,* 410 U.S. 719 (1973) the Court held that there are times when the voting for representatives affects a certain group more than others so that limiting the franchise to those who are specially affected is not violative of the Equal Protection Clause of the Fourteenth Amendment. In the case of *Gordon* v. *Lance,* 403 U.S. 1 (1971) this Court held that a West Virginia statute requiring a 60 per cent affirmative vote upon a proposition to incur debt was constitutional. Chief Justice Burger, after citing *Gray* v. *Sanders,* 372 U.S. 368 (1962) and *Cipriano, supra,* as not being controlling and emphasizing the issue being voted on, stated:

> "Although West Virginia has not denied any group access to the ballot, it has made more difficult for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our History, or our cases that require that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection

of a Governor by a State Legislature, after no candidate received a majority of the popular vote." [91 S. Ct. at page 1892].

The court below acknowledged the sovereign right of a state in the creation and structuring of subordinate government instrumentalities insulated from federal judicial review, but then found a "federally protected right" which was being damaged by state power. No "federally protected right" exists here for the participation on an equal basis in the election of representatives so it must be a right to participate in the determination of powers to be exercised by local governments. This is contrary to the Court's holding in the *Reynolds* v. *Sims, supra,* case and *Sailors* v. *Board of Education*, 387 U.S. 105 (1967) in that no such constitutional right exists. No "unlawful end" is being accomplished by the New York State Constitution or its Home Rule Law. The only end here is the establishment, modification or abolition of subordinate local government which is a legal end and the state concededly has full and complete power to do so.

The state procedure which operates to require more than a mere majority approval to effect change in the form of County Government falls within the thrust of the *Gordon* v. *Lance, supra,* decision. This method recognizes the differing needs of localities and that they are sometimes served best by the exercise of governmental power by small political units which are closer to the people and therefore more responsive to their needs. The procedure permits the state's sovereign rights to be exercised so that neither city dwellers' nor town dwellers' rights with respect to their own form of government can be overridden without mutual consent. *Saylor* v. *Tulare Lake Basin Water Storage District, supra.*

The *Cipriano* case and *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969) both stand for the

proposition that in certain circumstances varied voting procedures may be "necessary to promote a compelling state interest." See also, *Wells* v. *Edwards,* 409 U.S. 1092 (1973).

The procedure adopted by the people of New York State recognizes that there are important legal and factual differences between the form and nature of city government as selected by the voters resident within the city, and the form and nature of the town form of government as selected by the voters resident within the towns. There are important practical differences between the governmental needs of these two differing types of residents. The wisdom of the people of the state as a whole was to give protection to each against encroachment and dilution of chosen local government powers by requiring that before any county government, which encompasses both Cities and Towns could be replaced or modified, a majority of the voters in the Towns approve, and a majority of the voters in the Cities approve. This is a reasonable and responsible exercise of the state's sovereign right to determine its own form of government.

CONCLUSION

The Court should take jurisdiction to determine the constitutional issue involved by this case.

Dated: May 14, 1976.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER,
Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.
and FRANCIS W. SHEDD, Individually and on Behalf of
All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANTS

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Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

BRIEF ON BEHALF OF APPELLANTS

I

The Opinions Below

The opinions below are of a three-judge District Court for the Western District of New York.

The initial opinion is reported at 386 F.Supp. 1 (A. 130-144).

The second opinion, on remand from this Court (A. 161), is not officially reported, but appears at (A. 163-7).

Jurisdiction

This suit was brought under Civil Rights Act, 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). A three judge District Court for the Western District of New York was convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970). Its initial decision was filed November 22, 1974 (A. 130). Its initial judgment was entered on January 9, 1975 (A. 145-147).

The Town of Lockport, New York and Floyd Snyder, individually as a voter of the Town of Lockport and as Supervisor of the Town of Lockport, obtained an order from the District Court on March 5, 1975 permitting intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure (R. 24). Notice of Appeal to this Court from the January 9, 1975 judgment was filed and served by the intervening defendants (the appellants here) on March 6, 1975 (A. 148-149).

On October 6, 1975, this Court issued an order and judgment vacating the January 9, 1975 judgment below, and remanding the cause to the District Court for reconsideration with respect to the issue of mootness (A. 161).

On October 23, 1975, the District Court filed a decision reinstating the January 9, 1975 judgment with specified amendments (A. 163-7). A judgment implementing that decision was filed on December 15, 1975 (A. 167-170).

The jurisdiction of this Court to review these judgments on direct appeal is conferred by 28 U.S.C. § 1253.

Constitutional and Statutory Provisions Involved

The District Court has ruled that the following New York State constitutional and statutory provisions violate Section 1 of the Fourteenth Amendment to the United States Constitution.

Article IX § 1(h)(1) of the Constitution of the State of New York provides:

> § 1. BILL OF RIGHTS FOR LOCAL GOVERNMENTS
>
> Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:
>
> • • •
>
> (h) (1) Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form

of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit (McKinney's Consolidated Laws of New York, Vol. 2, p. 509).

Section 33(7) of the Municipal Home Rule Law of New York provides:

§ 33. POWER TO ADOPT, AMEND AND REPEAL COUNTY CHARTERS

7. A charter law

(a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast

thereon in all the villages so affected considered as one unit. Such a county charter or charter law shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof (McKinney's Consolidated Laws of New York, Vol. 35C, pp. 70-71).

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Is the federal judiciary authorized to circumscribe a state's sovereign power to define and to establish the form and structure of its subsidiary local governmental units by requiring—contrary to the constitution and statutes of the state—that any such form or structure be conditioned on one-person, one-vote referendum approval?

2. The New York State Constitution and the New York Municipal Home Rule Law provide that the adoption, amendment or repeal of a county charter must be approved on referendum by complementary majority votes of those voting in areas outside of the cities in the county taken as a unit and of those voting in the cities within the county taken as a unit.

Do these provisions constitute a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. A proposed new charter for the County of Niagara failed to obtain majority approval of the votes cast in the towns of the County, but obtained majority approval of the total votes cast in the County in a November 1972 referendum. Voter participation in the referendum was on the assumption that the State Constitution and the Municipal Home Rule Law properly required approval of a majority of the votes cast within the towns of the County and a majority of the votes cast in the cities of the County, and that a simple majority of all votes cast in the County would not be sufficient to enact the new charter.

Was it appropriate or within the jurisdiction of the District Court for that Court to "change the rules after the game" by ordering that the proposed charter become effective on the basis of the November 1972 referendum, as opposed to ordering a new referendum with prior advice to eligible voters that the rules would be different and that the prescribed complementary majority votes would not be required?

4. This action was brought to obtain a declaration that a proposed new charter for Niagara County put to voter referendum in November 1972 should be the law of the County. The action as filed, presented and decided dealt wholly and solely with the proposed 1972 charter. Before decision or judgment, a new charter was put to referendum in

1974 which, by its express terms, superseded the proposed 1972 charter. On the basis of a District Court judgment declaring the 1972 charter to be the law of the County and directing State and County officials to implement and to proceed in accordance with the 1972 charter, those officials proceeded to regard and to implement the 1974 charter as the law of the County.

Did the case become moot as a consequence of the destruction of the subject matter of the action—the 1972 charter—by the intervening purported adoption and implementation of a superseding charter in 1974?

5. The District Court initially declared the 1972 charter to be in full force and effect as the law of the County, refusing—on the grounds of lack of jurisdiction—to have its judgment apply to declare the superseding 1974 charter as the law of the County. That judgment was vacated by this Court. On remand, the District Court amended its initial judgment, declaring the 1974 charter to be the law of the County. No proceedings or hearings relating to the 1974 charter have been had or permitted.

Did the District Court exceed its jurisdiction in amending its judgment to apply to the 1974 charter?

6. Is this action barred by *res judicata* by reason of the District Court's dismissal on the merits of a prior action raising the same issues, seeking the same relief, and brought by the County of Niagara acting on behalf of its citizens?

7. Did the District Court have authority under 28 U.S.C. § 2283 to enjoin the prosecution of a preexisting New York State Court action attacking, on procedural and other grounds, the attempted implementation of the 1974 charter?

Statement of Case

In November, 1972, a proposed charter establishing a new county government for the County of Niagara in the State of New York was put to referendum, as required by the New York State Constitution and the Municipal Home Rule Law *(supra,* pp. 3-5). The proposed charter would effect major changes in the form and nature of county government, creating the positions of County Executive and Comptroller, and granting to the proposed new county government general governmental powers. The proposed charter would provide the new county government with the authority to perform substantial governmental functions, including the power to establish a tax rate, to adopt laws and procedures relating to equalization of assessments, to issue bonds, to maintain county property and roads, and to administer health and public welfare services. Under the proposed charter the cities within the County would retain substantially greater governmental autonomy than the towns would enjoy (A. 19-32).

Article IX § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the Municipal Home Rule Law of New York provide that the adoption, amendment or repeal of a county charter must be approved on referendum by a majority of those voting in areas outside of the cities in the county taken as a unit and by a majority of those voting in the cities within the county taken as a unit. There are eleven towns and three cities in the County of Niagara. The proposed charter failed to obtain a majority of the votes cast of the towns: 10,665 voting for and 11,594 against. In the cities, the vote was: 18,220 for and 14,914 against (A. 12, 134).

Since the proposed charter did not obtain the required affirmative votes, New York State officials refused to file the proposed new charter as a duly enacted Local Law permitting the charter to become effective.

In December, 1972, the County of Niagara (representing the citizens and voters of the County) commenced an action in the United States District Court for the Western District of New York against the State of New York, seeking a declaration that the governing New York constitutional and statutory provisions are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution *(County of Niagara v. State of New York,* Civ. 1972-656; (A. 172-7).) On April 3, 1973, the District Court filed its decision that the action should be dismissed on the merits (A. 178-182). The Order of dismissal was entered April 3, 1973. No appeal was taken. The plaintiff-appellees here made no effort to intervene in that case for purposes of prosecuting an appeal, or otherwise.

Nevertheless, on May 4, 1973, plaintiff-appellees commenced this action seeking the same relief as that denied by the District Court in *County of Niagara, supra,* on the same grounds as those dismissed on the merits in that action (A. 7-19). Application was made and granted, for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284 (R. 10).

No hearings were held or evidence adduced concerning the issues raised in the complaint. Instead, on cross-motions for summary judgment, the Court granted judgment to plaintiff-appellees, holding, contrary to its decision in *County of Niagara v. New York, supra,* that the New York State constitutional and statutory provisions governing the adoption of new county charters violate the Equal Protection Clause of the Fourteenth Amendment (A. 130-44). On January 9, 1975, a judgment was entered declaring those provisions to be unconstitutional and ordering the defendants to accept the charter for filing, and to implement it, on the ground that the charter had received a majority of the total number of votes cast in the 1972 referendum (A. 145-7). The Court noted

in its decision: "The precise issue here presented appears to be one of first impression" (A. 139).

Prior to the handing down of this decision, a new and different charter was put to referendum in November, 1974 (A. 70-127). This charter also failed to obtain the votes required by the New York State Constitution and the Municipal Home Rule Law but obtained a majority of the total votes cast (A. 128-9). Prior to the entry of judgment on the basis of the November 22, 1974 decision, a request was made to have that judgment apply to validate and to implement the 1974 charter rather than the 1972 charter which was the subject of the action. That request was denied by the District Court on the ground that since there had been no consideration of the charter put to referendum in 1974, or the circumstances of that referendum, and since the case which the Court had before it dealt wholly and solely with the charter put to referendum in 1972, the Court did not have jurisdiction to make its judgment apply to the charter put to referendum in 1974. Based on this refusal, the judgment entered on January 9, 1975 specifically declared that the charter purportedly adopted in 1972 was the governing law of the County of Niagara and specifically directed the State and County officials to implement that charter (A. 146-7).

On March 5, 1975, appellants were granted permission to intervene in order to prosecute an appeal to this Court (R. 24). The appeal was filed on March 6, 1975 (A. 148).

After the perfection of the appeal (Docket No. 74-1390), it was discovered that, with the concurrence of the plaintiff-appellees, the State and County governmental respondents were not implementing the 1972 charter, but in fact were proceeding to attempt to implement and to enforce, as the governing law of the county, the 1974 charter (R. 36, 38).

As a consequence of this intervening conduct on the part of the initial parties to the proceeding, appellants moved the District Court to vacate the judgment of January 1975 on the ground that the initial parties to the proceeding had destroyed the subject matter of the action and had effectively made the case moot. The Niagara County appellees conceded to the District Court as well as to this Court that the case had indeed become moot (R. 37, 41; Niagara County Appellees' May, 1975 Reply Brief to Jurisdictional Statement, p. 4). The District Court nevertheless refused to vacate the judgment on the ground that the reasons underlying the application were not "within the purview of Federal Rules of Civil Procedure Rule 60" (R. 40). Thereafter, this Court requested the parties to file briefs on the issue of mootness, and that was done.

On June 27, 1975, appellants commenced a proceeding in the New York State Supreme Court challenging the implementation of the 1974 charter (R. Ex-1). That proceeding was dismissed on the basis of the District Court's November 22, 1974 decision, without a hearing (R. Exs. 4, 5). An appeal was filed with the New York State Supreme Court, Appellate Division, Fourth Judicial Department.

On October 6, 1975, this Court entered an order and judgment vacating the January 1975 judgment and remanding the cause to the District Court ". . .for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974" (A. 161).

No hearings were had in connection with the remand to the District Court. Instead, counsel for the parties were summoned for oral consideration of the matter (A. 5, October 8, 1975). In recognition of the Court's lack of jurisdiction to effect a *nunc pro tunc* revision of the January 1975 judgment to apply to the proposed 1974 charter, the plaintiff-appellees moved to amend their complaint for the express purpose of

raising the issue of the validity of the 1974 charter and having hearings held with respect to the circumstances surrounding the November 1974 referendum and the proposed validation of the purported 1974 charter (A. 162, R. 46). The District Court denied that motion for amendment of the complaint, ruled that the case had not become moot, enjoined the prosecution of appellants' state court action, and amended its January 1975 judgment in order to make that judgment applicable to the 1974 charter (A. 163-7). This appeal followed on December 18, 1975 (A. 170-1).

Summary of Argument

The issue is state sovereignty

The fundamental constitutional issue presented is whether the states of the union have the absolute sovereign right to determine, without federal interference, what subordinate governmental subdivisions and instrumentalities they will employ to assist in the carrying out of state governmental functions, and to prescribe the means by which those determinations will be made.

Appellants make the following points:

—that subject only to the mandate of Article IV, Section 4, of the United States Constitution that each state shall have ". . .a Republican Form of Government. . .", each state has the absolute right and power to determine the form and structure of its subordinate governmental subdivisions and instrumentalities, and the concomitant discretion to prescribe the means by which such determinations shall be made;

—that there is, accordingly, no constitutional mandate requiring any state to permit direct voter participation by referendum in the determination of the form or structure of the state's subordinate governmental subdivisions;

—that in the exercise of its exclusive sovereign power and discretion, New York State may, in accordance with a constitution approved by its citizenry and implementing statutes enacted by its representative legislature, require that no changes in the form or structure of county government become effective without the complementary dual majority approval of voters residing in the cities of the county and of the voters residing in the towns of the county.

This case involves no claim that the questioned constitutional and statutory provisions in any way deprive any of the citizens of New York of a "Republican Form of Government". No claim is made that there is any denial of equal protection with respect to the election of governmental representatives. No claim can be made that the residents within the various counties of New York have a constitutional right—under the Fourteenth Amendment or otherwise—to direct participation by voter referendum in the determination of the form or structure of county or other subordinate governmental subdivisions of the State.

This is *not* a one-person, one-vote case. That doctrine has no application to the exercise by the State of its sovereign right to determine, in such manner as its constitution and general laws provide, the means or procedures by which decisions shall be made concerning changes in the form and structure of county government, and consequent changes in the rights and interrelationships of cities, towns, villages or other lesser subdivisions within the county.

If it be assumed that the one-person, one-vote doctrine has application, the complementary dual majority requirement is not, as treated by the court below, a *per se* violation. Plaintiff-appellees have failed to sustain the burden of establishing by competent proof that the constitutional and statutory provisions attacked result in "invidious discrimination", or that they are not warranted by legitimate internal State govern-

mental interests. On the contrary, those provisions reflect the voice of the entire State electorate that "close-to-the-people" state subdivisions must have protection from the possible tyranny of urban voters with different interests and concerns. Indeed, the provisions act as well to protect city municipalities from being overridden by non-urban majorities.

Improper relief and lack of jurisdiction

The initial judgment of the court below declared the 1972 charter to be the law of Niagara County on the ground that a majority of all voters within the County voted for its approval, and despite the fact that the complementary dual majority votes required by the law of the state pursuant to which the referendum was held were not obtained. The voters having participated in the referendum on the premise that the prescribed complementary dual majority votes would be required for adoption, the District Court improperly "changed the rules after the game" and preempted the voter's right to exercise his franchise with foreknowledge that a simple majority could result in adoption.

There was no showing that the charter would have obtained overall majority approval if the referendum had been held on that basis. No such assumption can be entertained. If relief was warranted, the Court should have required that a new referendum be held on the basis of the new rules.

In addition, in amending its initial judgment to make it applicable to the 1974 proposed charter rather than the 1972 proposed charter, the District Court committed the same error, and acted beyond its jurisdiction. The 1974 charter and the circumstances of its purported adoption were not part of this case. No proceedings or hearings were had or permitted concerning those matters. The Court had no jurisdiction to order its adoption or implementation.

Res judicata

The precise issues raised by the complaint were raised in an earlier action brought to obtain a declaration of unconstitutionality and to enforce the 1972 charter as the law of Niagara County: *County of Niagara v. State of New York,* Civ. 1972-656 (A. 172-7). The District Court there held that the one-person, one-vote concept had no application, that no substantial federal question was raised, and that the complaint should be dismissed (A. 178-82). That judgment is *res judicata.*

Mootness

The subject matter of this action was the proposed 1972 charter. The appellees have acted jointly to destroy that subject matter by purporting to adopt, and in fact implementing, a superseding and different charter in 1974. Appellees have thus rendered the proceeding moot.

Enjoining prosecution of state court action

The District Court exceeded its jurisdiction in enjoining appellants from proceeding with a state court action challenging—on procedural and other grounds—the certification and implementation of the 1974 charter. That action was contrary to 28 U.S.C. §2283, *Younger v. Harris,* 401 U.S. 37 (1971), and other decisions of this Court.

I. Subject only to the constitutional mandate that a Republican Form of Government be provided, each state has the exclusive sovereign right to establish—without federal interference—the structure of its subordinate governmental subdivisions, and to prescribe the means and procedures by which those structures will be determined.

This is a case of first impression. It involves a proposed extraordinary enlargement and extension of the one-person, one-vote rule of *Baker v. Carr,* 369 U.S. 186 (1962).

The question raised is whether the Equal Protection Clause of the Fourteenth Amendment requires a state to afford its citizens the right to determine, by election process compatible with the one-person, one-vote concept, the form or structure of subordinate governmental instrumentalities within the state.

A. There is no constitutional right of voter participation.

Consideration of the issues presented on this appeal must begin with the proposition—long acknowledged by this Court—that the states have the exclusive right and authority, without interference from the federal government or judiciary, to establish, modify or abolish local government units and structures. As the Court unanimously observed in *Gomillion v. Lightfoot,* 364 U.S. 339, at 343 (1960), the creation by the state of its municipalities is "clearly a political act".

In holding that the selection of members of a county school board did not necessitate an election, and that accordingly the principle of one-person, one-vote had no relevancy, the Court began its consideration in *Sailors v. Board of Education,* 387 U.S. 105 (1967), with the observation that:

We start with what we said in *Reynolds v. Sims, supra,* at 575;

'Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and *the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State."* '

"We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by election. Our cases have, in the main, dealt with elections for United States Senator or Congressman (*Gray v. Sanders, supra; Wesberry v. Sanders,* 376 U.S. 1) or for state officers (*Gray v. Sanders, supra*) or for state legislators. *Reynolds v. Sims, supra; WMCA, Inc. v. Lomenzo,* 377 U.S. 633; *Davis v. Mann,* 377 U.S. 678; *Roman v. Sincock,* 377 U.S. 695; *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713; *Marshall v. Hare,* 378 U.S. 561.

"They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials." (387 U.S. at 107-8 Emphasis supplied).

The Court thus reaffirmed the essential principle stated in *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), that the "number, nature and duration of the powers conferred upon" municipalities "rests in the absolute discretion of the state".

The language of *Hunter, supra,* further reflects what must be the touchstone for review of the findings of unconstitutionality in the case at bar:

"Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.*" 207 U.S. 161, at 178-9 (Emphasis supplied).

It is thus clear that the state would have the right, for example, to vest in its governor, or in some designated official—elected or appointed—the authority to determine and to prescribe the form and structure of municipal governments, and no citizen could demand as a matter of constitutional right that those determinations be made by vote of local residents. The matter is clearly political, and subject to political determination.

While the Court has repeatedly held since *Baker v. Carr, supra,* that equal suffrage is a constitutional necessity with

respect to the election of government representatives, the Court has never held that the authority of the state to create and to determine the appropriate form and structure of its subordinate governmental instrumentalities is limited or proscribed by any requirement of voter approval.

B. The teaching of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and other decisions is that this exercise by New York of its sovereign political power is insulated from federal judicial review.

The court below erroneously reasoned that although the state was not constitutionally obliged to permit voter participation in the matter of prescribing the form of its subordinate units of government, if it in fact allowed any such participation, it must do so only on a one-person, one-vote basis. Principal reliance was placed on the following language from *Gomillion v. Lightfoot, supra:*

> "When a State exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principal has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, *viz.*, that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result' " (364 U.S. at 347-8).

The court below acknowledged that in the creation and structuring of subordinate governmental instrumentalities the state is exercising sovereign power "wholly within the domain of state interest" which "*is insulated from federal judicial*

review." But the conclusion is then assumed that there is "a federally protected right" which is being circumvented by state power, and that therefore the insulation fails. The unanswered but dispositive question is: What *is* the "federally protected right" which the state constitution and statute offend? It is not the right to participate on an equal basis in the election of representatives, for there is and can be no claim of violation of that right. It cannot be the right to participate by direct local vote in the determination of the nature of powers to be exercised by local governments, for the teaching of *Hunter v. City of Pittsburgh, supra, Reynolds v. Sims,* 377 U.S. 533 (1964), and *Sailors v. Board of Education, supra* is that no such constitutional right exists.

In *Gomillion v. Lightfoot, supra,* the Court was dealing with the exercise of state power to effect a blatant discriminatory gerrymandering designed to deprive black voters of their franchise to elect government representatives. The federally protected right in *Gomillion* is the undisputed constitutional right of all voters to participate on an equal basis in the selection of elected representatives. That issue—that "federally protected right"—is not involved in this case. Since the appellees do *not have* a federally protected right to participate by direct vote in the structuring of the state's local governmental units, the challenged state laws cannot be held to violate a non-existent constitutional interest. The insulation from federal judicial review which *Gomillion* acknowledges therefor precludes such review.

Moreover, no "unlawful end" is being accomplished by the New York Constitution or its Home Rule Law. The end here is the establishment or modification of subordinate local government—a legal end as to the accomplishment of which the state concededly has full and exclusive power.

Nor is any constitutional power being "used by way of condition to attain an unconstitutional result". The result here is

not unconstitutional. The state has the right to create its own subordinate government units on such terms as it may select provided only that the citizens of the state are afforded a "Republican Form of Government" within the meaning of Article IV of the Constitution. *With or without the proposed new charter, Niagara County is and would be governed by a "Republican Form of Government" through a legislative body selected in accordance with the one-person, one-vote mandate.*

Gomillion v. Lightfoot, supra, does not stand as authority for the District Court's decision in this case. Indeed, *Gomillion* itself demands a holding that New York is exercising sovereign power wholly within the domain of its own state interest which is insulated by the Constitution from federal judicial review.

Nor is the determination below either mandated or supported by *Gray v. Sanders,* 372 U.S. 368 (1962) or by *Avery v. Midland County,* 390 U.S. 474 (1967). In *Gray,* the Court was again reviewing the process of election of government representatives, holding that since Georgia regulated the conduct of party primaries through exercise of state powers, its action with respect to that part of the representative election process was state action, thus affording standing to sue to any citizen whose right to vote for such elected representatives was impaired by that state action. The protected right involved in *Gray* as well as in *Avery* is the right of the citizen to vote on an equal basis with all other voters for elected representatives, and not to have state action debase or dilute that specific constitutionally protected right. The charter referendum procedures in New York in no way impinge upon that existing, insured right.

C. The establishment and structuring of subordinate state governmental subdivisions are internal, political matters constitutionally reserved to the exclusive control of the states.

The issue may be sharpened by considering a simple hypothetical. What view would the Court take of a Congressional enactment *requiring* each state to put to direct referendum vote all matters relating to the establishment or modification of the form or structure of subordinate state governmental subdivisions such as counties, parishes, regions, towns, villages, cities or the like? We venture to state that but little time would be required to pronounce such a statute to be an impermissible federal invasion of the states' sovereign power to prescribe its own internal governmental structure by such means as it sees fit. As a matter of logic as well as constitutional necessity, would not the result be the same if the federal statute did not contain such a blanket requirement but presumed to provide that *if* a state elected to permit any form of limited or other than simple majority voter participation or control as to such matters, that it *must* fashion its procedures on a one-person, one-vote simple majority rule basis? In either case, the governing principle remains the same. Other than as expressly permitted by Article IV, Section 4, of the Constitution, neither the Congress nor the federal judiciary have the constitutional power to invade any state's retained right to construct its own internal system of government. And yet, that is precisely what the lower court judgment accomplishes.

The Tenth Amendment to the Constitution serves to emphasize what was and is implicit in the United States federal system and in its original, unamended Constitution:

> "Article X
>
> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There was from the beginning great concern that the sovereign integrity of the individual states to govern themselves be honored and protected in the Constitution. Before ratification, James Madison wrote:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. . . If the new constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of new powers to the Union, than in the invigoration of its original powers." *(The Federalist,* 45 Madison: *Powers and Continuing Advantages of the States,* Edited by B. F. Wright, Belknap Press, pp. 328-9).[1]

There is no express authorization in the Constitution for federal control of the structuring of the state government. Even where the federal government is granted express power to exercise authority to the displacement of state sovereignty, such as the regulation of interstate commerce under the express authority of the Commerce Clause, this Court has but recently evidenced a welcome sensitivity to the necessity of balancing the competing interests of our federal system.

In *The National League of Cities v. Usery,* 44 U.S.L.W. 4974 (U.S. June 24, 1976), this Court held that 1974 amendments to the Fair Labor Standards Act which would extend the Act's

[1] See *Cohens v.. Virginia,* 19 U.S. 264 at 418 (1821) for an expression of the interpretational value of *The Federalist.*

minimum wage and maximum hour provisions to virtually all employees of states and their political subdivisions, were not within the authority granted Congress by the Commerce Clause. Speaking for the Court in overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968), Mr. Justice Rehnquist noted:

> "But we have reaffirmed today that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California*, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of the power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty.' 392 U.S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause." 44 U.S.L.W. at 4980.

There is, we submit, a pressing need for judicial self-restraint and constitutional conservatism in this case. There is no contest here between the principle of state sovereignty and the rights of the citizen to Equal Protection under the Fourteenth Amendment, for the simple reason that no such individual rights are impinged upon by New York's Constitution or legislation. The contest is whether this Court will permit the federal judiciary to extend the one-person, one-vote concept beyond the bounds of its reason for existence and thus permit that salutory concept to "...devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment". *Maryland v. Wirtz, supra*, at 205 (Justice Douglas' dissent). Few things could be more essential to state sovereignty than the state's exclusive right—exercised by its citizens through its constitution and general legislation—to set up its own form of government and is own political subdivisions in its own way.

II. The New York Procedure Governing the Structure of its Subordinate Governmental Subdivisions Does Not, in Any Event, Offend the Equal Protection Clause.

There is and can be no claim that the laws under review either directly or indirectly deprive any citizen of voting equality with reference to the election of representatives, state or local. They deal not with representation, but with the means and procedures which the State has determined are most appropriate to effect changes in the form or structure of local governments. They reflect the judgment of the people of the State acting directly through the approval of the amendment in 1935 of the New York State Constitution to include Article IX §1 (h) (1), and indirectly through their elected representatives by enactment of §33(7) of the New York Municipal Home Rule Law.

The people of the State, in a general election held on November 5, 1935, voted to include the complementary majority vote requirements in the Constitution, with 62% in favor and 28% opposed—a margin of 2.6 to 1 in favor. The subject of local home rule, and the protection of the instrumentalities of "grass roots" government from encroachment or destruction by larger subdivisions, has been studied and debated within the State on a virtually continuous basis. Recurring efforts to remove the protections afforded by the complementary majority requirements have failed to obtain voter approval (See *Revised Record, New York State Constitutional Convention 1938*, Vol. IV, pp. 2956-2969; New York State Legislative Document No. 58, 1959, *Report of the Temporary Commission on the Revision and Simplification of the Constitution;* Vol. 13, Temporary State Commission on the Constitutional Conventions, 1967).

It is not a matter of semantics to urge upon this Court the proposition that the determination of the form and structure

of subordinate state government instrumentalities is a political matter over which the people of the state as a whole, by exercise of their political rights, have exclusive control.

The New York State procedure under review was designed and operates to require something more than a mere majority approval to effect a change in the form of county government and consequent changes in the inter-relationships between county authority and city, town and village authority. *Gordon v. Lance,* 403 U.S. 1 (1971). The procedure recognizes that the needs of localities are often best served by the exercise of governmental power by smaller political units which are closer to the people, more intimately familiar with their local problems and needs, and more directly responsive to the people. *Dusch v. Davis,* 387 U.S. 112 (1966). The procedure was designed to exercise the state's sovereign right in such a fashion that neither the city dwellers' rights with respect to city government, nor the town dwellers' rights with respect to town government, could be overridden without mutual consent. *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973).

This Court has not stripped the states of all governmental discretion and flexibility even in situations involving the election of representatives. In *Salyer* it was held that the "popular election requirements enunciated by *Reynolds*" were inapplicable to general elections of a Water Storage District, and that California could constitutionally limit the vote to landowners as distinguished from nonlandowners and lessees. Of course, the challenged New York constitutional and statutory provisions do not go so far. No voter qualified to vote in general elections is prohibited from voting. The complementary majority provisions provide a system of "checks and balances" while granting voter participation in matters where no federal constitutional right to vote exists.

The one-person, one-vote principle is surely not some omnipresent, all encompassing, all governing presence hovering over and intruding into all state and local functions and activities. *Cipriano v. City of Houma,* 395 U.S. 701 (1968) and *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), tell us that in particular circumstances, outright exclusions of qualified voters may be "necessary to promote a compelling state interest" (at 627). In *Wells v. Edwards,* 409 U.S. 1095 (1973), Louisiana constitutional provisions for the election of state Supreme Court justices from election districts established without regard to population, were upheld in the face of a one-person, one-vote attack. See *Fortson v. Morris,* 385 U.S. 231 (1966); *Newton v. Commissioners,* 100 U.S. 548 (1879).

In *Dusch v. Davis, supra,* the Court upheld an election plan for the selection of representatives which was in part based on candidate borough residency requirements, without regard to population, observing that the plan "seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megolopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. at 117).

The restraining and tempering views of the Court as expressed in *Sailors v. Board of Education, supra,* must not be lost in pursuit of a simplistic and insensitive extension of a principle beyond the bounds of its *raison d'etre*:

> "Viable local governments may need innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." (387 U.S. at 111).

Approval of the decision below would result in an extension of the one-person, one-vote principle and the coincident extension of judicial control into political areas never

contemplated by the decisions spawning that principle. A holding of unconstitutionality must also strike down other similar statutory provisions which provide safeguards against coerced annexation of local units by their larger neighbors (See Section 33-a Municipal Home Rule Law of New York, McKinney's Consolidated Laws of New York, Vol. 35c, p. 26, Supplement).

In *Missouri v. Lewis,* 100 U.S. 22 (1879), this Court upheld state statutes which provided for appeals to the Missouri Supreme Court from judgments rendered in certain counties while prohibiting appeals from similar judgments rendered in other counties, in the face of claims of denial of equal protection under the Fourteenth Amendment:

> "Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by any thing in the Constitution of the United States, including the amendments thereto.
>
> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws." (100 U.S. at 30-31).

In *Luther v. Borden,* 48 U.S. 1 (1849), this Court refused to impose its judgment on the question of which of two competing constitutions had been properly adopted in Rhode Island, Chief Justice Taney expressing the Court's views:

> "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure." (48 U.S. at 46-47).

In no case has this Court extended or indeed presaged the extension of *Baker v. Carr, supra,* to the process of the state's selection of the form and structure of its local municipal governments.

With but rare exceptions, previous cases in which this Court has invoked the one-person, one-vote rule have involved the election of governmental representatives. *Baker v. Carr, supra; Reynolds v. Sims, supra; Salyer Land Company v. Tulare Lake Basin Water Storage District, supra,* and cases reviewed therein. The exceptions have related to the approval of general obligation bonds, *Phoenix v. Kolodziejski,* 399 U.S. 204 (1969),

and to the approval of revenue bonds, *Cipriano v. City of Houma, supra.*

The constitutional mandate is not one-person, one-vote, but equal protection of the laws. The simple fact that a vote is involved in a state procedure relating to its internal government functions does not automatically call the one-person, one-vote concept into play. The question must be whether equal protection of the laws has been denied. The answer here is that there has been no showing of any such denial, despite the clear burden of proof on the plaintiff-appellees to establish the existence of "invidious discrimination" (See *Holshouser v. Scott,* 335 F. Supp. 928, 933 (M.D.N.C. 1971), *aff'd* 409 U.S. 807 (1972); *Stokes v. Fortson,* 234 F. Supp. 575, 577 (N.D. Ga. 1964); *Wright v. Rockefeller,* 376 U.S. 52 (1964); *White v. Regester,* 412 U.S. 755 (1973); *United Jewish Organization of Williamsburgh v. Wilson,* 510 F.2d 512 (2d Cir. 1974).

In *Wells v. Edwards,* 347 F. Supp. 453, at 455 (M.D. La. 1972), *aff'd* 409 U.S. 1095 (1973), the Court held that: "[T]he rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary." The rationale is even less relevant to the procedures by which the states determine to establish or modify their internal governmental structures or subdivisions.

The procedure adopted by the people of New York State recognizes that there are in fact important legal and factual differences between the form and nature of city government as selected by the voters resident within the city, and the form and nature of the town form of government as selected by the voters resident within the towns. There are important practical differences between the governmental needs of these two

differing types of residents. The wisdom of the people of the state as a whole was to give protection to each against encroachment and dilution of chosen local government powers by requiring that before any county government could be superimposed or modified, a majority of the voters in the towns approve, and a majority of the voters in the cities approve. This is a reasonable and responsible exercise of the state's sovereign political right to determine its own form of government.

Nor can it be claimed that the urban resident is disadvantaged by this procedure. The basic constitutional provisions were again adopted and approved by the voters of the state as a whole acting on referendum as recently as 1963 (Article IX, Section 1, added 1963, McKinney's Consolidated Laws of New York, Book 2, Constitution). The procedure is subject to change by the same political means by which it was initially adopted. There is a constitutionally appropriate means of political change. Since approximately 10.6 million people reside within the cities of the state, while approximately 7.5 million live in the towns, urban voters have the numerical potential to effect such change if desired (New York State Constitution, Article XIX, Vol. 2 McKinney's Consolidated Laws of New York p. 678).

Since 1965, new charters for county government have been proposed to the citizens of 14 counties. Three charters were adopted by obtaining the complementary dual majority votes required. Eight charters failed to obtain a majority vote in either the towns or in the cities of the county. One failed to obtain majority approval of the city voters; two (including Niagara County) failed to obtain majority approval of town voters. This experience demonstrates that the provisions in question do not operate to the advantage or disadvantage of any defined group of citizens.

The proposed Niagara County Charter involves major modifications in political approach. It would effect the realignment and transference of existing government functions and prerogatives among and from local government units to the proposed county government unit. The citizens residing in the towns within the county have a direct stake in their existing town governments and in the powers and authorities with which those governments operate. The same is true of city residents with respect to city governments. Accordingly, it is altogether proper to require the unit majority approval of these two classes of government instrumentalities to the superimposition of a new county government which would have very material effects on existing local control of local matters, and on the responsibility for and payment of various services. The complementary majority approval procedure is justifiable even if the one-person, one-vote concept were to have application to this kind of state political action.

Even in those circumstances where the one-person, one-vote concept has relevance, it has been recognized that something different or more than simple majority approval can properly be required. *Mahan v. Howell,* 410 U.S. 315 (1972); *Gaffney v. Cummings,* 412 U.S. 735 (1972).

What would the Court say here if the provisions under attack required not a dual majority but a 60% or 65% or 70% majority vote of the whole? Depending on the population mix of the particular county, either city or town residents might be heard to complain that a disproportionate weighting was being accorded to the numerically smaller group. The same cries of "veto power" and deprivation of equal suffrage as are made in this case would be heard. But, the Court would say, as it should here:

> "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris,* 385 U. S. 231 (1966)." (*Gordon v. Lance,* 403 U.S. 1, at 6, upholding a 60% referendum approval of bonded indebtedness or increases in tax rates).

In sum, the challenged New York constitutional and statutory provisions do not result in a denial of equal protection of the laws.

III. The District Court Improperly Preempted the Role and Rights of the Electorate.

Essential to the integrity of any voting process is knowledge on the part of those qualified to vote as to the consequences and effect of the vote cast or not cast. Those involved and affected must "know the rules of the game" before the game is played.

The voters of Niagara County were not once, but twice, offered proposed new charters in referenda held on the basis that to become effective, the charter must obtain the complementary majority votes required by the State Constitution. Votes were cast or not cast in reliance on that premise. Prereferendum political efforts at persuasion or education were also based on the proposition that the charter could not become effective without the dual majority. The referendum was *not* conducted, and the voters did *not* act, on the premise that a simple majority of the total votes cast countywide would be sufficient to provide approval.

The District Court, however, changed the rules after the game was twice played and held that under new and different

rules, pursuant to which no voter had acted, the proposed charters had gained approval.

The relief granted by the District Court assumes an unproven and unprovable conclusion: that the results of the referenda would have been the same if the voters had known in advance that the rules were different than they thought, and that a simple majority would control. Equality of voting rights and the one-person, one-vote concept itself necessitate an exercise of the voting prerogative with advance knowledge of the consequences of the vote cast.

It was improvident and violative of voter rights for the District Court to order the charters to become effective. Even if the finding of unconstitutionality had merit, the equitable and proper relief would be to order or permit a new referendum based on the new rules. *Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra.*

IV. The Court Below Exceeded its Jurisdiction in Entering the December 1975 Declaratory Judgment that the 1974 Charter is in Full Force and Effect as the Form of Local Government for Niagara County.

We begin with the proposition that a court cannot act *sua sponte*, but must await the action of some person invoking its jurisdiction. In declaring the 1974 charter to be the instrument defining local government in Niagara County, the District Court was, in effect, invoking its own jurisdiction.

The validity of the 1974 charter was not placed in issue by the pleadings in this case. There were no hearings or proceedings with respect to the 1974 charter. Indeed, the District Court itself specifically refused to have its original January 1975 judgment apply to the 1974 charter for the very reason that that charter was not before the Court, not part of the case, and therefore beyond the jurisdiction of the Court.

Nor was the 1974 charter's validity "tried by express or implied consent of the parties" within the meaning of Section 15(b) of the Federal Rules of Civil Procedure. In fact, the District Court denied petitioners' motion to amend the complaint in this action in order to give the Court jurisdiction and to have hearings with respect to that charter (A. 156-60, 162. R. 46). Nevertheless, the Court below presumed to enter a judgment declaring that charter to be the law of the County of Niagara.

In attempting to justify this unusual judgment, the District Court stated that:

> "The 1974 charter is already part of the record in this case and the United States Supreme Court has specifically directed us to consider it."

We have the following observations as to this proffered justification:

1. The record in this case, with respect to the issues presented by the petition, became complete upon entry of the District Court's judgment determining those issues on January 19, 1975. The purported 1974 charter was not part of that record.

2. The District Court itself initially refused to consider the 1974 charter on the very ground that it was *not* a part of the case and therefore beyond its jurisdiction.

3. The initial appeal of the intervening defendants to this Court was from the January 1975 judgment, which related wholly and solely to the 1972 charter.

4. The sole relevance of the 1974 charter to this case and to the appeal is with respect to whether the purported adoption and the actual implementation of that charter rendered this case moot.

5. At various times during proceedings relating to the District Court's January 1975 judgment, all parties to the ac-

tion conceded that the District Court did *not* have jurisdiction over the 1974 charter and could not render any judgment with respect to it.

6. The direction of this Court to the District Court on October 6, 1975 was to *reconsider the case before it* in light of a subsequent legislative development as that legislative development might make the case before the Court moot. It was not a direction to the Court to consider the *validity* of the subsequent legislative development, or to enter a declaratory judgment concerning the enforceability or governing effect of that legislative development.

The District Court exceeded its jurisdiction in attempting to render a judgment declaratory of the validity or enforceability of the 1974 charter.

V. The Action is Barred by *Res Judicata.*

The April 3, 1973 decision of the District Court for the Western District of New York in *County of Niagara v. State of New York,* Civil 1972-656 (A. 178-82), was pleaded as *res judicata,* barring prosecution of the instant action.

In refusing to dismiss the action on that ground, the court below delineated the required conditions for the defense to be available:

> "Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a 'final judgment on the merits' in the prior action; (2) identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party to or in privity with a party to the prior action. *Kreager v. General Electric Company,* 497 F.2d 468, 471-72 (2 Cir. 1974), quoting from *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944, 955 (2 Cir.), *cert. denied,* 377 U.S. 934 (1964)."

The District Court found that the present plaintiff-appellees were not in privity with the County of Niagara in the prior action and thus declined to apply the bar of *res judicata.*

This finding was manifestly erroneous. The very opening sentence of the District Court's decision in *County of Niagara v. State of New York, supra,* is:

> "Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York." (A. 178).

The instant action was commenced and prosecuted by plaintiff-appellees as a class action on behalf of the voters of Niagara County (A. 9-10, 47-52), the same allegedly aggrieved persons on whose behalf the *County of Niagara v. State of New York, supra,* action was brought. In that action:

—The County of Niagara took the same position and sought the same relief as plaintiff-appellees do in the case at bar;

—Precisely the same constitutional and factual issues raised in this case were raised and determined.

The plaintiff-appellees here were aware of the pendency of the Niagara County suit but made no effort to gain intervention on the ground that their rights were not being protected by the County. The present action was filed only after the judgment in *County of Niagara v. State of New York, supra,* had become final.

This case is, and should be, barred by *res judicata.*

VI. The Case Became Moot Before the Court Below Entered its Judgment of December 1975.

The specific and sole purpose of this action was to obtain an order directing the Niagara County and State respondents to file and to certify Niagara County 1972 Local Law No. 1, providing for the adoption and implementation of a new charter form of government for the County. The subject matter of the action was the validity of the proposed 1972 charter as put to referendum in November 1972. The judgment questioned on appeal declared the 1972 charter to be "in full force and effect as the instrument defining the form of local government for Niagara County" (A. 146-7).

Prior to the entry of the District Court's January 9, 1975 judgment, respondents requested that the Court make the judgment applicable to the 1974 charter rather than to the 1972 charter, in order to provide that the 1974 charter would be the "instrument defining the form of local government for Niagara County". Since the case as filed, processed and decided dealt solely with the proposed 1972 charter and the 1972 referendum, and neither the parties nor the Court had addressed themselves to the proposed 1974 charter, and since there was at that time no case or controversy concerning the proposed 1974 charter, the District Court properly refused the application.

Despite these facts, appellees proceeded to file, certify and proceed in accordance with the purported 1974 charter immediately after appellants obtained an order to show cause on February 27, 1975 to gain intervention to prosecute an appeal to this Court from the District Court's January 9, 1975 judgment. Long prior to the District Court's December 1975 judgment purporting to amend the January 9, 1975 judgment to declare the 1974 charter as the law of the County, appellees had destroyed and abandoned the 1972 charter.

As conceded by the Niagara County appellees in a brief filed with this Court in May 1975:

> "[Point] III. The question before the Court in regard to the 1972 Charter is now moot." (Appellees Graf and Comerford May 1975 "Reply to Jurisdictional Statement", Docket No. 74-1390, p. 4).

The District Court's *ex post facto* attempt to change the subject matter of the action notwithstanding, the case has become moot.

A. The Constitution forbids judicial action except where a live controversy exists.

Article III, Section 2, of the Constitution requires as a condition to federal jurisdiction the existence of a live case or controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

This Court's appropriate sensitivity to this jurisdictional prerequisite is clearly reflected in a number of recent mootness decisions. For example, in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), the Court declined to exercise jurisdiction and dismissed the appeal, stating at page 570:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. "*Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . .' " *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295."

In *Roe v. Wade*, 410 U.S. 113, at 125 (1973), the Court said:

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."

See also: *Golden v. Zwicker*, 394 U.S. 103 (1969); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Oil Workers Union v. Missouri*, 361 U.S. 363 (1960).

Any rights plaintiff-appellees had with respect to the implementation of the 1972 charter have now passed, since that charter has, with their concurrence, been extinguished and is not being implemented. There is no longer any live controversy in this proceeding.

B. This case does not fall within any of the recognized exceptions to the mootness doctrine.

There appear to be three principal exceptions to application of the mootness doctrine. None of these exceptions has application here.

1. The Court has refused to dismiss for mootness where the question involved is "capable of repetition, yet evading review". See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

The basic rationale for this exception appears to be that review should not be foreclosed by the fact that the time element involved in the questioned activity is so short that the activity under review is necessarily completed before the judicial procedure can be completed. This exception has no relevance to the instant case since the mooting events are not inherent in the situation (such as in cases relating to voting in a specific election, pregnancy and so on) but in fact are intervening voluntary actions by respondents. The constitutionality of the New York constitutional and statutory provisions are cable of being tested in a properly brought

proceeding, involving an actual and live controversy, without mooting events occurring because of any inherent time limitation. The following cases indicate the type of situation in which this exception has application and indicate that it has no relevance to this proceeding. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1975); *Storer v. Brown*, 415 U.S. 724 (1974); *Rosario v. Rockefeller*, 410 U.S. 755 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilvie*, 394 U.S. 814 (1969).

2. The Court has refused to dismiss for mootness where there are collateral consequences from the questioned activity. In cases such as *Mancusi v. Stubbs*, 408 U.S. 204 (1972), *Sibron v. New York*, 392 U.S. 40 (1968), and *Carasas v. LaVallee*, 391 U.S. 234 (1968), the Court held that even though the specific issue in the case had become moot, there were continuing consequences to the litigants which demanded review and resolution of the issues presented. Essentially, these cases involve circumstances where criminal sentences have been served but the collateral consequences flowing from the convictions give the parties a sufficient continuing personal stake in the matter to allow the Court to make a negative mootness determination. There are, of course, no continuing collateral consequences of the this nature stemming from the purported adoption of the 1972 charter or its abandonment by the respondents. In fact, respondents themselves urge that the 1972 charter has been repudiated and superseded by the 1974 referendum and charter. The result is that the 1972 charter and referendum have passed from the scene, leaving no rights which now press for adjudication. What is now at issue is whether the purported 1974 charter has been properly adopted and effectuated—an issue which is before the New York Courts.

3. The Court has on occasion declined to dismiss for mootness where the defendant voluntarily discontinues the

questioned activities. The Court has refused to reach a finding of mootness where the defendants have discontinued the questioned action, on the ground that there could be no assurance that the questioned activity would not be resumed once the judicial process had been terminated by the finding of mootness. This was the rationale for the exception when it was first applied in *United States v. W. T. Grant Company*, 345 U.S. 629 (1953). The same rationale was employed in the later decisions of *Mancusi v. Stubbs, supra; U.S. v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); and *Gray v. Sanders*, 372 U.S. 368 (1963).

In the case at bar, the respondents have taken the position that the proposed 1972 charter has been completely superseded, extinguished and replaced by the 1974 charter. Respondents are not proceeding in any fashion to implement or to attempt to implement the 1972 charter. Respondents advise the Court that no such effort will be made. In addition, the appellants who assert mootness have absolutely no ability and no intention to attempt to engage in the questioned activity raised in the proceeding as initially filed, that is, the implementation of the 1972 charter. Accordingly, this exception has no application in this case.

C. Practical considerations support a determination of mootness.

The issues involved in any consideration of the constitutionality of Article IX of the New York State Constitution or of Section 33(7) of the Municipal Home Rule Law of New York are of far-reaching importance. At the date of this submission, 105 towns and villages in the State of New York had adopted formal resolutions of support for the position being taken by the intervening appellants in this action.

The present proceeding comes to the Court with an extraordinarily spare record. No testimony or evidence was ad-

duced to establish the practical and governmental justifications for the New York State provisions. On the contrary, the judgment below is predicated on cross-motions for summary judgment. Adjudications of this magnitude should not be made in a factual vacuum. If it is held that the one-person, one-vote doctrine has application, the issues and the courts deserve substantially more in the way of a record with respect to a matter of such significance.

As the Court stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), at page 588:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)."

Since, as conceded by respondents, this proceeding has become moot, and since none of the exceptions to the mootness doctrine have application, it is submitted that the Court should adhere to previous rulings, declare the case to be moot, and vacate the judgments below.

VII. The Judgment Below Constitutes an Impermissible Interference with Pending State Court Proceedings.

On June 27, 1975, the Town of Lockport commenced an Article 78 proceeding challenging the attempt by the Secretary of State of the State of New York to certify, implement and enforce the 1974 charter. It was not until October 6, 1975 that this Court directed the District Court to consider the question of mootness in light of the 1974 charter. In presumed response to that direction, the District Court entered its declaratory judgment validating the 1974 charter. By that

time, the state court proceeding attacking the validity of the 1974 charter had been pending for six (6) months, and the state court of first instance had already rendered a decision and judgment, from which an appeal was pending. The 1974 charter was never the subject of "any proceedings of substance on the merits" in the federal courts. Thus, the District Court has improperly interfered with a pending state court proceeding.

In *Younger v. Harris,* 401 U.S. 37 (1971), this Court held that federal injunctions against pending state criminal actions can be issued *only* under *extraordinary circumstances* where the danger of irreparable harm is both *great* and *immediate.* In *Samuels v. Mackell,* 401 U.S. 66 (1971), a companion case to *Younger v. Harris, supra,* the Court held that:

> "The same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." (401 U.S. 66, at 73).

The basic rationale underlying *Samuels* was a concern that *Younger* would be effectively emasculated by the use of federal declaratory judgments which would have effects identical to those injunctions. As the Court noted:

> "The practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (401 U.S. 66, at 73).

The *Younger* doctrine should be applied in the instant case. In *Huffman v. Pursue,* 420 U.S. 592 (1975), this Court held that *Younger* applied to an Ohio civil proceeding, stating:

> "The component of *Younger* which rests upon the threat to our federal system is . . . applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."

The Court carefully limited the scope of its decision to the particular civil statute at hand, and, thus, left open the much broader question of the applicability of *Younger* to state civil proceedings in general. However, the Court took cognizance of the Federal Circuit Court decisions in which *Younger* has been held to be applicable to state civil proceedings and noted that:

> "The seriousness of federal judicial interference with state civil functions has long been by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

If this Court is not prepared to extend the prerequisites to federal interference with state criminal proceedings set forth in *Younger* to *all* civil cases, we submit that those prerequisites should apply to those cases which involve questions of state governmental administration. A showing of either "extraordinary circumstances" or "great and immediate" harm should be as necessary in this class of cases as it is in criminal prosecutions.

Appellants should not be enjoined from proceeding with the state court action challenging the 1974 charter.

28 U.S.C., Section 2283, provides:

> "A court in the United States may not grant an injunction to state proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The court below attempted to justify its injunction as having been rendered "in order to protect the judgment of

this court". However, the 1974 *per curiam* opinion of the Supreme Court in *Poe v. Gerstein,* 417 U.S. 281 (1974), stands for the proposition that an injunction of state court proceedings to protect the judgment of a federal court is unjustified in the absence of an allegation that the state court would not respect the federal court's judgment.

Here, there has been no allegation that the state court would not respect the federal court's decision. Indeed, the lower state court in the pending Article 78 proceeding felt itself *bound* to accept the decision of the District Court as to constitutionality. In the absence of any indication that the courts of New York State will not respect the federal court's decision, this injunction is improper.

As stated in *Atlantic Coast Line Railroad Co. v. Brotherhood of Engineers,* 398 U.S. 281, 297 (1970):

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

Moreover, appellants' state proceeding raises issues other than the constitutional issues which were at issue in the District Court, that is, that there were numerous procedural defects in connection with the filing of the 1974 charter which require its revocation and recission (R. Ex. 1). If the injunction is allowed to stand, the Town of Lockport will be forever foreclosed from obtaining a determination of those issues. Certainly it cannot be seriously argued that foreclosure of these procedural issues is necessary to effectuate the judgment of the District Court.

CONCLUSION

The Judgments Below Should be Reversed.

The judgments of the District Court for the Western District of New York entered on January 9, 1975 and on December 18, 1975 should be reversed, and the case remanded with instructions to enter judgment dismissing the complaint. The order of remand should also instruct the District Court to make such orders as may appear appropriate, after hearing the parties, to reinstate the county form of government existing prior to implementation of the 1974 charter.

Respectfully submitted,

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July 1976

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLEES GRAF AND COMERFORD

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September, 1976.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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Appellees.

Appeal from a Three Judge Court of the United States District Court For The Western District of New York

BRIEF ON BEHALF OF APPELLEES GRAF AND COMERFORD

Questions Presented.

1. Whether dismissal of a prior action brought in the Federal Court by the County of Niagara on behalf of its

citizens and voters against the State of New York, which raises substantially the same issues as are raised in this action, constitutes a bar to this class action under the doctrine of *Res Judicata*?

2. Whether the subject matter of this case, the constitutionality of Article IX, Section (1)(h)(1) of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York, which arose in regard to the 1972 Charter and which arose again in the 1974 Charter, is moot?

3. If not, whether the creation of dual voting units of unequal population within a single political subdivision of a state, consisting of a majority of those voting in areas outside of the cities in the County and by a majority of those voting in the cities within the County in reference to a county charter form of local government, so dilutes and debases the right of the county-wide majority as to violate the equal protection clause of Amendment Fourteen to the United States Constitution.

4. Did the District Court exceed its jurisdiction in reinstating and amending its original judgment by decreeing that the 1974 County Charter supersedes the 1972 County Charter, and that the 1974 Charter be in full force and effect as the instrument defining the form of local government for Niagara County?

Statement of Facts.

In November, 1972, the voters of the County of Niagara adopted a Charter by referendum vote with the following results:

	FOR	*AGAINST*
Cities	18,220	14,914
Towns	10,665	11,594
Totals	28,885	26,508

In November, 1974, a charter was placed on the ballot for Niagara County and the following vote was had:

	FOR	*AGAINST*
Cities	11,305	9,222
Towns	8,059	8,222
Totals	19,364	17,444

Both charters were passed by a total majority of the persons voting in the referendum.

The County Attorney ruled that only a majority of the votes cast were needed to pass the charter voted upon in November, 1972, by the plain meaning of Article IX, Section (1)(h)(1) of the New York State Constitution, and Section 33, Subdivision 7 of the Municipal Home Rule Law of the State of New York which implements Article IX, Section (1)(h)(1) of the New York Constitution.

The Secretary of State of the State of New York refused to accept for filing the Charter adopted in 1972 on the grounds that the 1972 Charter did not pass by a majority of votes in the areas outside of the cities in the County and by a majority of those voting in the cities within the County, by a separate majority vote.

The County of Niagara, relying on the opinion of the County Attorney, brought an action challenging the refusal of the Secretary of State to accept the 1972 Charter for filing.

The Title of the action was County of Niagara vs. The State of New York—Civil 1972—656 (District Court for the Western District of New York). This action was dismissed by Honorable Judge John O. Henderson who found no substantial federal question requiring the convening of a three-judge Court (A-178). Judge Henderson states:

> "Where a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *Gomillion v. Lightfoot* 364 U.S. 339, 347 (1960).
>
> Title 28, United States Code, Section 2281 does not require the convening of a three-judge court when the constitutional attack upon a state statute is insubstantial . . . The facts presented by this case do not raise a substantial federal question.
>
> *In light of the foregoing, this court does not reach the other contentions of the Plaintiff.* Plaintiff's motion to convene a three-judge court is denied. The motion of Defendant to dismiss is granted." (Emphasis supplied).

It was decided by the County Legislature of Niagara County not to appeal the District Court's decision on the 1972 Charter and to propose a different Charter which the voters might find more acceptable. The County of Niagara was not enjoined by Judge Henderson's decision from taking such action, nor by any subsequent order. The results of the November, 1974 referendum were as previously stated and raised the same issue as did the referendum on the Charter adopted in November, 1972. This is a matter capable of repetition yet evading review.

In the meantime, Plaintiff-Appellees, on May 7th, 1973, commenced an action for the same relief and a three-judge Court was convened by Judge John T. Curtin

(W.D.N.Y.) and resulted in a judgment (A-130), 386 F. Supp. 1 (1974), which related to the Charter adopted in November, 1972 (A 146-147).

The provisions of the judgment of January 9, 1975 (A 146-147), declared Article IX, Section (1)(h)(1) of the New York State Constitution and Section 33, Subdivision (7) of the Municipal Home Rule Law of the State of New York were unconstitutionally in violation of the equal protection clause of the Fourteenth Amendment; and, the Court ordered the implementation of the Charter adopted in November, 1972.

After an intervening appeal, the three-judge District Court on remand from the United States Supreme Court, ordered implementation of the Charter adopted in November, 1974 by a judgment entered December 15, 1975 (A 167-169).

The appellants brought a special proceeding in New York State Supreme Court attacking the 1974 charter. The State Court dismissed this special proceeding on the 28th day of July, 1975 after adopting the reasoning of the Federal District Court. The State Court further found that all New York State procedures for filing a charter had been complied with.

Pursuant to the 1974 Charter, a County Executive was elected in November, 1974 and is now serving. County Legislators have been elected to four-year terms, and many department heads appointed and departments implemented by the hiring of staff personnel. A Commissioner of Finance will be elected in November, 1976.

The three-judge Court had both the 1972 and 1974 Charters before it on remand from the United States Supreme Court and also the necessary statutory law. The Court states (A 165):

> "First of all, as admitted by the Town of Lockport and as is evident from a perusal of the 1972 and 1974 Charters, there is no substantial difference between the two Charters. The only differences are merely technical ones relating to the functions and duties of the various officers and branches of the proposed county government."

There is no question that all either charter doss is to streamline administrative functions of county government. Section 105 of the 1974 Charter is as follows:

> "Section 105. *Local Government Functions, Facilities & Powers Not Transferred, Altered or Impaired.* No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code."

Summary of Arguments.

Mootness.

The subject matter of this action is not moot since the problem presented herein is one which is capable of repetition, and there still exists a definite and concrete controversy between the parties.

Res Judicata.

Res Judicata is not applicable in this case, since the private citizens who are members of the plaintiff class, in the instant action, are not bound by the judgment in the

prior action because they were not formal parties to that action, and there is no basis upon which to hold them in privity with Niagara County.

Jurisdiction of District Court.

The District Court had jurisdiction to render a decision concerning the 1974 charter and validating it as part of its prior judgment concerning the 1972 charter.

District Court did not Improperly Preempt the Role and Rights of the Electorate.

In regard to appellants statement that there was a "change of rules after the game was played", the District Court states on October 23, 1975, that it "is simply irrelevant to a determination of whether the sections are constitutional". Appellants make an assertion that voters participated in the voting with the idea that a double referendum would be required in November, 1972. This is obviously unprovable and the result of the referendum was the same in November of 1974 when all voters must have known of the controversy between the parties.

Enjoining Prosecution of State Court Action.

The January 9, 1975 judgment by the District Court pursuant to 28 USC, Section 2283 enjoined the Town of Lockport and its agents from proceeding further with any state court action to effectuate the prior District Court's judgment which otherwise would be violated by the state court proceedings.

The Provisions of Article IX, Section (1)(h)(1) of the New York State Constitution and Section 33, Subd. (7) of the Municipal Home Rule Law Requiring Double Referendums are Unconstitutional Under the Fourteenth Amendment of the Constitution of the United States.

The instant case is a violation of a citizen's equal protection under the Fourteenth Amendment. Once a statutory right is granted to a citizen to vote (*Article IX, Section (1)(h)(1)* of the *New York State Constitution; Section 33(7), Municipal Home Rule Law of New York*) that right cannot be conditioned to result in invidious discrimination unless it can be legitimized by compelling state interest. There is no justifiable state interest in having two units, cities and areas outside of cities, voting by dual referendum on a matter which affects both units in the same manner.

POINT I

The issue of constitutionality of Article IX (1)(h)(1) of the Constitution of New York and Section 33(7) of the Municipal Home Rule Law is not moot.

The issue is not whether the 1972 Charter is moot, but whether the issue of the dual referendum requirement established by statutes and needed to pass the 1972 and 1974 Charters, is moot.

First of all, there is no substantial difference between the 1972 and 1974 Charters, as decided by the District Court (A 19-31, 70-127). The issue in both Charters has been the unconstitutionality of the statutes and constitutional provisions in question.

Under the U. S. Supreme Court's direction on remand, the judgment was vacated and the Court directed to consider the 1974 Charter, and the District Court made it the effective instrument for governing Niagara County. The 1974 Charter has been substantially implemented at the present time. Therefore, there exists a live controversy or case before the Court within the meaning of cases such as *Moore v. Ogilvie,* 394 U. S. 814, (1969) and subsequent cases where mootness has not been held if the issue is capable of repetition yet evading review.

POINT II

The action is not barred by *Res Judicata.*

On April 3, 1973, the County of Niagara brought suit against the State of New York on behalf of voters, seeking a declaratory judgment and injunctive relief against enforcement by defendants of Article IX (1)(h)(1) of the New York Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York. The defendant now pleads this dismissal as *res judicata* to the instant case.

Under settled law, three factors must be present to support a defense of *res judicata:*

1. There must have been a "final judgment on the merits" in the prior action.

2. Identical issues sought to be raised in the second action must have been decided in the prior action.

3. The party against whom the defense is asserted must have been a party to or in privity with a party to

the prior action. *Kreager v. General Electric Company,* 497 F2d 468, 471 (2d Cir. 1974), quoting from *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F2d 944, 955 (2d Cir. denied, 337 U.S. 934 (1964)).

These Appellees concede that there was an identical issue in the prior action as in the action presently before the court.

As to the element of plaintiff-appellee being a party to the first action or in privity, the District Court in the decision of the *United States Court for the Western District of New York,* November 22, 1974, 386 F. supp 1, (A-130) concluded that the third requirement of *Kreager, supra,* was absent. The court held that "private citizens who are members of the plaintiff class are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to the action and there is no basis upon which to hold them in privity with Niagara County. *Williamson v. Bethlehem Steel Corporation,* 468 F2d 1201, 1203, 1204, (2d Cir. 1972) Cert. denied 411 U.S. 391, 1973; 1(B) *Moore Federal Practice,* Sec. 0.411(1) 2d ed., 1974.

Plaintiff-appellee was not a formal party to the previous action, since he was not named nor did he participate in the prior action, nor can he be considered in privity with the County of Niagara since there was no legal relationship or legal interest which the two share. *International Tel. & Tel. Corp. v. General Telephone & Electronics Corporation,* 380 F.Supp. 976, (M.D.N.C. 1974), and *Falk v. Falk Corporation,* 390 F.Supp. 1276 (E.D.Wis. 1975). In addition, there is no authority for the proposition which appellant put forth, that a political subdivision has privity with its citizens merely by citizenship.

The District Court, *supra,* goes on to state that absent statutory or contractual authority, a person cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party to that litigation purports to represent all individuals who share an interest in the subject of the action. *Dudley v. Meyers,* 422 F2d 1389, 1393-1394 (3d Cir. 1970); 113 *Moore,* Section 0.411(1), at 1253, and Section 0.411(3) at 1423; *F. Kersh Lake Drainage District v. Johnson,* 309 U.S. 485 (1940); *United States v. Kabinto,* 456 F2d 1087 (9th Cir. 1972), Cert. denied, 409 U.S. 842 (1972). There was no statutory or contractual authority in the instant case to establish that appellee was in privity with or a party to the previous action. There is also no claim that the County of Niagara was authorized to seek vindication of the constitutional rights of its "citizens and voters", or that any member of the present plaintiff class consented to being represented in the prior action of the court.

The prior action was not commenced nor prosecuted by plaintiff-appellees as a class action on behalf of the voters of Niagara County, since it was not brought pursuant to *Federal Rules of Civil Procedure,* Section 23. If it were brought as a true class action, then the court would have to consider whether proper notice, under *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 172-177 (1974), and adequate representation, *Hansberry v. Lee,* 311 U.S. 32 (1940), were granted to the class. Looking at the facts, we can see that the District Court, in the prior action, was not called upon to make the initial determination under Rule 23 of the *Federal Rules of Civil Procedure* as to whether the County could or would "fairly and adequately protect the interest of the class" claimed by the defendant to have

been represented. See *Federal Rules of Civil Procedure*, Sec. 23 a(4). Nor was the Court afforded the opportunity to consider the desirability or necessity of formulating provisions for notice to the members of the class. *Federal Rules of Civil Procedure*, Sec. 23 d(2), *Eisen v. Carlisle and Jacquelin, supra,* or to deal with similar procedural matters, *Federal Rules of Civil Procedure*, Sec. 23 d(5).

POINT III

The District Court had jurisdiction to render a decision concerning the 1974 Charter and validating it as part of its prior judgment concerning the 1972 Charter.

The District Court had before it, on October 6, 1975, the following order of the United States Supreme Court:

> "The Judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new Charter adopted by Niagara County in 1974."

Under 28 USC 2106, and *Yates v. U. S.*, 354 U. S. 298 (1956) the Supreme Court or any other court of appellate jurisdiction may, affirm, modify, vacate, set aside, or reverse any judgment, decree, or order lawfully brought before it for review and may direct such further proceeding as may be just under the circumstances.

All parties stipulated to have the 1974 Charter as an exhibit upon the remand of the U.S. Supreme Court to the District Court.

On remand, all of the parties consented to making the 1974 Charter part of the record as an exhibit. The District Court on October 23, 1975 stated: A-163

> "The parties stipulated that the 1974 Charter and also the proceeding in the New York State Courts in which the Town of Lockport sought to invalidate the 1974 Charter be marked as exhibits in this case."

A stipulation of fact fairly entered into, where there is no mutual mistake, is controlling and conclusive and courts are bound by it.

U. S. v. 788.16 Acres of Land, More or Less in Emmons County, N D 439 F 2d 291, 1971; *Hoffman v. Celebrezze,* 405 F. 2d 833 (8th Cir. 1969); *Burstein v. U. S.*, 232 F2d 19 (8th Cir. 1956).

POINT IV

The District Court did not improperly preempt the role and rights of the electorate.

The answer to the assertion that the District Court improperly preempted the role and rights of the electorate is the answer that was given by the District Court; that the claim that the voters must know the "rules of the game" is simply irrelevant in the face of a constitutional challenge.

To require another referendum now would inject political issues into the referendum process not present when the 1974 Charter was adopted, such as the performance in office of those who won elections conducted under the 1974 charter, and the political affiliations of those who won contests. It would give the losing candidates for the office of County Executive and County Legislature a chance to defeat the incumbents by indirection.

Section 2402 of the 1974 charter states as follows:

> "Section 2402. *Amendment of Charter.* This charter may be amended in the manner provided by law. Except as otherwise provided in this charter, any local law which would create or abolish an elective county office . . . shall be subject to mandatory referendum . . ."

Subsequent sections provide for a Charter Review Board and a systematic review of the charter.

If change or repeal of the 1974 charter is desirable, the state legal machinery is present to allow such change in an eminently equitable manner.

A new referendum on the charter proper would result in almost complete chaos in Niagara County government and impair the validity of official acts taken since January 1, 1976. It would also produce years of litigation and a multiplicity of lawsuits. This could not be an equitable result nor an economically provident one.

In the general elections of November, 1975, political power was taken from one major party and given to another by the will of the voters. Naturally, the losers want to change this result, if possible, by destroying the 1974 charter. They want to change the result of the recent elections, after they have been held.

POINT V

There was no impermissible interference with pending State Court proceedings.

Under *Younger v. Harris,* 401 U.S. 37 (1971) and *Huffman v. Pursue,* 420 U.S. 592 (1975) as they relate to 28 U.S.C., Sec. 2283, the District Court had to issue an in-

junction to sustain its judgment. The State Court proceedings were before the District Court on remand by stipulation. The constitutional determination had already been made. To accept appellants' contentions would give New York State Courts the right to review a matter already decided, which could again be presented to the United States Supreme Court.

As to the question of procedural defects in filing the 1974 charter, that issue was resolved against appellants in the state courts. Administratively, the Secretary of State of the State of New York has filed the charter. In any event, appellants should have raised it on remand to the District Court since the remanded direction vacated the District Court's judgment. They had every opportunity to raise the issue and failed to do so.

POINT VI

The provisions of Article IX, Section (1)(h)(1) of the New York State Constitution and Section 33, subd. (7) of the Municipal Home Rule law requiring double referendums are unconstitutional.

There can be no disagreement with *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) in a general sense. New York State, with a proper procedure, could abolish all referenda for adoptions of charters in political subdivisions.

Voting when granted by a state is a federally protected right espoused by many decided cases and a state is not insulated from Federal Judicial review in regard to a violation of it.

Gomillion v. Lightfoot, supra, held that the right of all voters to participate on an equal basis in elections for representatives of the people was such a right.

To say that each voter has an equal right to vote for county legislators from comparable districts and generally for a county executive, but not an equal right to vote for a form of government under which such legislators and Executive are guided and constrained is a perversion of the *Gomillion* doctrine. *Wells v. Edwards,* 347 F. Supp. 453, at 455 (M.D. La. 1972), aff'd 409 U. S. 1095 (1973) only limited the general rule where judges are concerned; judges being persons not directly involved in the elective political process of governing the populace.

The right of equal citizens to vote for a form of government equally affecting all of them is directly within the contemplation of such cases as *Gray v. Sanders,* 372 U. S. 368 (1962) and *Avery v. Midland County,* 390 U.S. 474 (1967).

Addressing the decision of *National League of Cities v. Usery,* 44 U.S.L.W. 4974 (U.S. June 24, 1976), raised by the Appellants, it is clear it has no relevance to this case. The Federal Government is not forcing its will on the State of New York by the District Court's decision but only saying that if you hold an election, each citizen equally affected has an equal vote.

What rational or compelling State interest has been posited to justify and defend the veto power given to the towns as a group and the cities as a group to defeat a charter affecting equally all citizens as a group?

In *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973) landowners only were allowed to vote as opposed to others because landowners were paying the cost of a service benefit district. That would seem to be a valid distinction to limit a federally protected right.

Salyer can be distinguished factually from the present case. *Salyer* involved the election of directors of a California Water Storage District which had been formed only to provide water to farmers in the Tulare Lake Basin. The cost of the project undertaken by the defendant water storage district was assessed against the land serviced by the district in proportion to the benefits received. The limited purpose of the district was held to warrant the challenged voting scheme whereby each voter was entitled to cast one vote for each $100 value of land and improvements owned. Unlike the situation in *Salyer,* the functions which are to be performed by the County of Niagara government under its Charter are of a general governmental nature. Such governmental functions clearly would affect all residents of Niagara County equally. No one in Niagara County would have a special interest in the 1974 Charter and there are no unusual or limited purposes of government found in the Charter warranting a *Salyer* type result.

A group of cases discredit the defendant-appellant's position, beginning with *Kramer v. Union School District No. 15,* 395 U.S. 621 (1969). In *Kramer,* the court invalidated municipal referenda on the grounds that they contravened the Equal Protection Clause of the Fourteenth Amendment. *Kramer,* the first of these cases, overturned Section 2012 of the New York Education Law which re-

stricted otherwise qualified voters from participating in school district elections unless they either owned or leased realty in the area or were parents of school children in local schools. The Court concluded at the outset that the provisions would be subject to strict scrutiny "to determine whether each local resident has as far as possible, an equal voice". In *Cipriano v. Houma,* 395 U.S. 701 (1969), the court declared a violation of the Fourteenth Amendment regarding a statute which limited the voting franchise in municipal utility bond election to property taxpayers. In *City of Phoenix v. Kalodziepki,* 399 U.S. 204 (1969), the court invalidated the limitations placed on elections regarding the issuance of general obligation bonds. Therefore, the Supreme Court has already applied the one man-one vote principle to non-representational referenda. In all three cases, *Kramer, Cipriano* and *Phoenix,* the attempt to narrow the elective to "those who were primarily interested" was not found to satisfy the compelling state interest requirement of the Fourteenth Amendment. The most recent addition to this line of cases is *Hill v. Stone,* 421 U.S. 289, 95 Sct. 1637 (1975). The court in *Hill* nullified provisions of the Texas Constitution and Election Code as well as the Fort Worth Charter, which limited the franchise in municipal bond elections to property owners. The Court concluded that the bonds were not a matter of "special interest" to property owners, and neither was there a compelling state interest to justify limiting the franchise. *Hill* appears to be dispositive of the issues in this case. The Texas "dual box election procedure" was determined to be a violation of the Fourteenth Amendment. In *Hill,* a bond election was involved in which people owning property voted as a

group and non-property owners voted as a group. The claim that there was a special interest which negated the impact of the Fourteenth Amendment and that such special interest represented a compelling state purpose, was rejected. The dual referendum requirement in question before this Court in the present case is an even greater violation of the Fourteenth Amendment than found in *Hill v. Stone, supra.* The present case involves only general governmental powers. The townspeople of the County of Niagara have not acquired a "special interest" over the city people on the adoption of the Charter, nor can it be proven that they do have a special interest; nor can the reverse be proven. The Charter was created to affect all individuals in the County, Towns and Cities equally, with the provisions affecting the same equally.

Since the townspeople or city dwellers have not acquired a special interest, and there is no compelling state interest to justify limiting or diluting equal voting rights, the statute and constitutional provision must fall for violating the Fourteenth Amendment.

The defendants proceed to argue that because of the potential long-range untold consequences of the Niagara County referendum, the State was justified in placing the responsibility for such a fundamental change as that affecting the form of government in the hands of a super-majority. They argue further that since each of the separate voting units within Niagara County might have vetoed the adoption of the Charter, the dual majority requirement did not authorize discrimination against any identifiable group and therefore did not violate the Fourteenth Amendment. No it didn't. It authorized discrimination against two identifiable groups.

The case of *Gordon v. Lance*, U.S. 1 (1971) is clearly distinguishable from the instant case. In *Gordon*, the Supreme Court upheld a 60% super majority requirement in referendums on general obligation municipal bonds and increased tax levy. They held that there was no identifiable group which was shown to be discriminated against. The Supreme Court concluded "it must be remembered that in voting to issue bonds, voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand". In the instant case there is no such long range consequences of the Charter form of government. Also, if census statistics are resorted to, there is an unlimited potential for discrimination of blacks within the cities of the County of Niagara. This is a consideration worth noting and for requiring a strong state interest if defendant-appellants are to justify a dual referendum requirement.

Gordon is also distinguishable on yet additional grounds:

First, the dual majority requirement of the instant case does not provide, as defendants-appellants suggest, for a simple majority vote. In fact, the dual majority requirement of the instant case has a potential for unlimited dilution of the majority vote. Conceivably, a Charter could lose by one vote in either the towns or cities and be passed by a tremendous majority overall. In *Gordon* there was a super-majority limit of 60%.

Second, unlike the situation in *Gordon*, the dual majority requirement does discriminate against and did dilute and debase the vote of an identifiable group, both the City dwellers of Niagara County and town dwellers.

Third, the Court in *Gordon* reaffirmed the holding in prior cases that where there was a dilution of voting power based on geographical location, it was impermissible if there was no valid special relationship to the interest of those groups in the subject matter of the election.

Previously, these Appellees have shown in this document that there is no legal or factual differential upon the impact of this Charter upon the categories of City residents as distinguished from Town residents.

Had the State of New York accepted these Appellees original construction of the New York Constitution and Municipal Home Rule Law to the effect that a dual referendum was required only when there was a transfer of functions, powers or duties or other infringements upon existing cities or towns, in a proposed Charter, the Appellants might have some validity to their arguments. But that issue is foreclosed.

POINT VII

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

BRIEF OF APPELLEES CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, individually and on Behalf of All Others Similarly Situated.

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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Appellees.

BRIEF OF APPELLEES

Jurisdiction

The jurisdiction was properly stated in the appellant's brief except on the subject of the remand by this Court. The cause was remanded on October 6, 1975 for reconsideration in light of the provisions of the new Charter adopted by Niagara

County in 1974 (A. 161). On October 8, 1975, the District Court heard argument of counsel and a 1974 County Charter and the official record of the vote cast for the 1974 Charter was made part of the record in the cause (A. 70, 128). On October 23, 1975, the District Court filed a decision and made specific findings amending the judgment of January 9, 1975 so that the 1974 Charter, which superseded the 1972 Charter, is in full force and effect as the instrument defining the form of local government for Niagara County (A. 166). The reinstated and amended judgment was granted on December 15, 1975.

Questions Presented

1. Whether creation of dual voting units of unequal population within a single political subdivision of a state, having general governmental powers, consisting of the voters of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

2. Is the creation of separate voting units of unequal population within a single political subdivision having general governmental powers, based upon the place of residence, within the cities of a county considered as one unit and in the area outside the cities of a county considered as a separate unit, in which no specific group of voters were primarily interested or affected as compared to any other group, an inherently suspect classification for voting purposes which requires the State to furnish justification under strict scrutiny, that such constitutional and statutory

provisions are necessary to promote an articulated state goal, which classification is based upon a compelling state interest?

3. Does the creation of separate classifications of voters, consisting of voters of the cities of a county considered as one unit and the voters in the area of a county outside of cities, in a unit of local government having general governmental powers over the entire geographic area, in which no specific group of voters was primarily interested or affected as compared to any other group, restrict the franchise to vote in violation of the Fourteenth Amendment?

4. Did the District Court properly interpret the remand of October 6, 1975 from this Court and has the appellant preserved the right to raise such question on this appeal?

5. Whether dismissal of a prior action brought in the District Court by the County of Niagara, as the party plaintiff, purportedly on behalf of its citizens and voters against the State of New York which raised substantially the same issues as raised herein, constitutes a bar to the instant class action by aggrieved voters under the doctrine of *res judicata*. Whether the defense in bar of *res judicata* may be raised in this Court by the appellant who was not a party to the prior action.

Statement of Case

The County in New York State is a general unit of local government. Article 9 of the New York Constitution, the local government article, which was adopted in 1963, contains a provision, Article 9, § 1(h)(1), for the adoption of an alternative form of county government commonly known as a County Charter form, which primarily converts county

government from a single branch legislative form of local government to an executive-legislative form. The provision applies to all areas of the State other than New York City and contains the requirement that no such form of government, or amendment thereof, shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and in the cities of the county, if any, considered as one unit. On September 6, 1972, the Niagara County Legislature adopted a Niagara County Charter, the express purpose of which was the separation of the County Legislative and Executive functions and responsibilities; the securing of the greatest possible County Home Rule, and the accomplishment of increased efficiency, economy and responsibility in the Niagara County government (A. 19). It was alleged by the plaintiffs-appellees in their complaint and amended complaint and admitted by the County defendants-appellees in their answer to the complaint that no specific group of voters, residents or other persons was primarily affected or interested as compared to another group of voters (A. 12, 36, 54), (The County defendants-appellees did not answer the amended complaint). By the express terms of the Charter, no function, facility, duty, or power of any city, town, village, school district or other district was to be transferred, altered or impaired by the Charter (A. 27).

On November 7, 1972, the proposed Charter was voted upon by the voters of the entire geographical unit, the County of Niagara. It received a majority vote in the County as a whole and in the cities of the County as a unit, but it did not receive a majority vote in the towns of the County, the area outside the cities of the County. Therefore, it was not certified as the duly adopted form of local government for Niagara County.

The population of the cities of Niagara County as a unit is 147,026. The population of the area outside the cities is 88,694 (A. 34). In the 1972 referendum, a total of 55,393 votes were cast. 11,594 negative votes were cast in the towns of Niagara County, 20.93% of the total vote, which minority vote prevented the adoption of the Charter (A. 12).

In December 1972, an action was commenced in the U. S. District Court for the Western District of New York entitled *County of Niagara vs. State of New York* in which the plaintiff was represented by the Niagara County Attorney (A. 172). On April 3, 1973, an order dismissing that action was granted (A. 178). On May 1, 1973, the plaintiff-appellee Shedd requested the Niagara County Legislature, in session, to appeal the dismissal of that action, to preserve it, to give him an opportunity to intervene or commence a separate action as a voter and on behalf of all other voters throughout the County who voted in favor of the Charter. The Niagara County Legislature refused the request of Mr. Shedd (A. 183-185). On May 4, 1973, the present action was commenced by Shedd individually and as a class action on behalf of aggrieved voters.

The order for a three judge District Court was granted on April 24, 1974. The case was heard by the three judge District Court on June 20, 1974. The decision was rendered on November 22, 1974 (A. 130).

In the interim, on August 20, 1974, the Niagara County Legislature adopted a 1974 Niagara County Charter subject to a referendum on November 5, 1974 (A. 70). The proposed 1974 County Charter expressly superseded any prior local law in the event of an inconsistency or conflict (A. 73) and by its

terms, no function, facility, duty or power of any city, town, village, school district or other district was to be transferred, altered or impaired by the 1974 County Charter (A. 73).

In the referendum of November 5, 1974 the voters of the entire geographical unit of general government, the County of Niagara, participated. The Charter received a majority vote in the County as a whole and in the three cities of the County as a unit but it was defeated by the class of voters in the area outside the cities of the County (A. 128, 129). In 1974, 36,808 votes were cast in the referendum. 8,222 negative votes were cast in the area outside of the cities of Niagara County, 22.33% of the total vote, which minority vote prevented adoption of the Charter.

On January 9, 1975 a judgment was granted declaring the constitutional rights of the voters of Niagara County pursuant to the guarantee of equal suffrage contained in the Fourteenth Amendment of the United States Constitution. The 1972 Charter was given full force and effect as the instrument defining the form of local government for Niagara County.

The Secretary of State of the State of New York certified the 1972 Charter as the form of local government for Niagara County. This action the District Court had enjoined. On February 28, 1975, the Secretary of State also certified the 1974 Charter as an independent act (Record-¶ 28, app. petition in State Court proceeding). The Niagara County Legislature and the Niagara County defendants-appellees, on advice of the County Attorney, decided there was an opportunity to implement the 1974 Charter, which had not been the subject of a judgment declaring the double majority provision of the New York Constitution in violation of the

Fourteenth Amendment. The County Attorney contended the judgment of January 9, 1975 had become moot. The appellant sought a determination that the judgment of January 9, 1975 was moot and a reversal of that entire judgment.

On October 6, 1975 this Court vacated the judgment of January 9, 1975 and remanded the cause to the District Court for reconsideration in light of the provisions of the new Charter adopted by Niagara County in 1974 (A. 161). On October 8, 1975, the District Court heard arguments of counsel and received the 1974 Charter and the official canvass of the vote upon the 1974 Charter as exhibits (A. 70, 128). On October 23, 1975, the District Court rendered a decision reinstating the earlier judgment and amending it to give the 1974 Charter full force and effect as the instrument defining the form of local government for Niagara County. Judgment was entered thereon on December 15, 1974 which judgment also denied the motion of the plaintiffs-appellees to amend the amended complaint. A notice of appeal was filed on December 18, 1975. The appellant did not appeal from that portion of the judgment denying the motion of the plaintiffs-appellees to amend the amended complaint.

In its statement of facts, the appellant is inaccurate as to certain facts which, we believe, should be corrected. In the case of the settlement of the January 9, 1975 judgment which implemented the 1972 Charter, when the plaintiffs-appellees moved to settle that judgment, the Niagara County attorney requested in a letter to the District Court a stipulation that the judgment apply to the 1974 Charter (Record and Appendix A-P. 10 of motion to affirm, plaintiffs-appellees, April 1976). On the return of the motion to settle the judgment, the plaintiffs-appellees, in open Court, agreed to stipulate, but the At-

torney-General of the State of New York refused to enter into a stipulation and there being no motion before the Court on the subject or an appropriate application, the Court made no determination of such issue and granted the judgment prepared by the plaintiffs-appellees.

The appellant is also inaccurate that the plaintiffs-appellees concurred that the 1974 Charter should be implemented, rather than the 1972 Charter, without authorization of the District Court.

At all times, the plaintiffs-appellees urged the District Court and the County officials of Niagara County that the judgment of the District Court must be specifically complied with. A motion for further injunctive relief in furtherance of the District Court's judgment was made by the plaintiffs-appellees on August 20, 1975 and was undecided when the remand by this Court occurred on October 6, 1975 (A. 150-160). The plaintiffs-appellees then expanded such motion to include a prayer for relief to amend the amended complaint to add a cause of action pertaining to the 1974 Charter, which motion was denied (A. 162-170).

THE ARGUMENT

I. The election at issue herein is one for a form of government in a unit of local government, having general governmental powers, in which no group of voters has any special interest.

The nature of county government in New York State and the rights, privileges, functions and duties to be conferred upon such government upon the adoption of a County Charter are set forth in the County Charters which are contained in the appendix (A. 19 *et seq.*, 70 *et seq.*) and the complaint and amended complaint of the plaintiffs-appellees (A. 12-13, 53-54).

That the proposed Charter of County government is to serve all the voters, citizens and residents of the entire geographic area of the County uniformly and that no specific group is primarily affected or is specially interested is clear from the Charters. The plaintiffs-appellees alleged such ultimate facts in each of their complaints (A. 12, 54). The County defendants-appellees admitted the allegations (A. 36). The State defendants-appellees denied the allegations but did not plead affirmatively any facts to identify or justify any group or class of voters having a special interest, either in their answer or by any evidence in this cause (A. 66 *et seq.*). The Attorney-General of New York did contend, in effect, in the District Court that residence in the cities or in the area outside the cities of a county *per se* constituted a constitutionally permissible special interest.

The appellant contends in this Court that city residence and town residence, the area of the county outside the city, in New York State, being in all instances divided into towns, is a suf-

ficient justification per se for the State of New York to create separate classifications of voters that should be upheld (App. br. p. 25-33).

Thus the record to justify the restriction on the franchise consists solely of the text of the New York Constitution, Art 9, § 1 (h) (1), 2 McKinney's Consolidated Laws of New York, P. 509 and its statutory implementation, § 33 (7) Municipal Home Rule Law, 35c McKinney's Consolidated Laws of New York, P. 70.

The classification restricts the franchise of a class of voters without the justification of a compelling state interest, which is a disfranchisement that was struck down in *Kramer vs. Union Free School District* 395 U. S. 621, 89 S. Ct. 1886 (1969); *Cipriano vs. City of Houma* 395 U. S. 701, 89 S. Ct. 1897 (1969) and *Phoenix vs. Kolodziejski* 399 U. S. 204, 90 S. Ct. 1990 (1970). It is the dual box voting procedure rejected in *Hill vs. Stone* 421 U. S. 289, 95 S. Ct. 1637 (1975).

The classification constitutes a dilution or debasement of the franchise by unequal citizen population units, as well, and a dilution of equal voting power which was found defective in *Gray vs. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963), in *Reynolds vs. Sims*, 377 U. S. 533, 84 S. Ct. 1362 (1964) and in *Avery vs. Midland County, Texas* 390 U.S. 474, 88 S. Ct. 1114 (1968).

In the Niagara County referenda for the proposed Charters, 20.93% of the town voters blocked the adoption of the Charter in 1972 and 22.33% of the town voters blocked the adoption of the Charter in 1974 under the New York voting scheme. In New York State, using the residence statistics contained as an exhibit to the complaint (A. 33-35) as a

measurement, a minority of 2% of city voters in the City of Long Beach in Nassau County could block a County Charter. Theoretically, one negative vote in one of the voting units could defeat the favorable vote of the other unit of voters.

From either viewpoint, that of city voter or town voter, this is a fencing in or fencing out of a class of voters because of the way they may vote and is unconstitutional. *Carrington vs. Rash* 380 U. S. 89, 85 S. Ct. 775 (1965).

II. It is the election franchise that is the fundamental right, entitled to protection. The purpose of the election is secondary.

In the District Court opinion of November 22, 1974, the Court stated that the precise issue herein appeared to be one of first impression (A. 139).

Although prior cases may not have specifically dealt with a referendum to decide the form or structure of local government, the issue is that of the impact or restriction on the franchise. There is no valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. *Hadley vs. Junior College District of Metro, Kansas City* 397 U. S. 50, 54, 90 S. Ct. 791, 794 (1970). As this Court expressed the standard in *Hill vs. Stone* 421 U. S. 289, 95 S. Ct. 1637 (1975):

> "The basic principle expressed in these cases is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."

In *Avery vs. Midland County, Texas* 390 U. S. 474, 88 S. Ct. 1114 (1968), the facts involved representation in local government and the right of the aggrieved voters to a vote of substantially equal weight to the vote of every other resident. But the division on the Court seems to have involved a consideration of the impact upon the structure of local government. The Court specifically held:

> "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single member districts of substantially unequal population." (390 U.S. at p. 485, 88 S. Ct. at P. 1121)

The County Charter form of local government constitutes a development of an arrangement of local government. The Court in *Avery* emphasized that its decision would not bar the emergence of new structures for local governments.

That the Court in *Avery* recognized that its extension of the protection of the franchise to local government would be applicable to the adoption of new forms and structures of local government appears likely from a comparison of the majority opinion and Justice Harlan's dissenting opinion. The dissent seems to predict that functional, area wide, county wide government will not be achieved unless the barriers between city and suburb are maintained to facilitate compromise. The barriers and the fences have remained up another decade and the dual box, the double majority, voting schemes have not brought about compromises. To the contrary, they have raised the barriers. The implementation of Fourteenth Amendment rights, we suggest, can bring about more com-

promise and more progress that invidiously discriminatory dilution or debasement of equal suffrage could ever accomplish.

III. The restriction upon the franchise, justified by the appellant to prevent encroachment by city and town voters on one another, cannot stand.

In his brief, the appellant speaks of "important practical differences between the governmental needs of these two differing types of residents." (App. br. p. 30). He uses the terms home rule and protection of grass roots government from encroachment by larger subdivisions (App. br. p. 25). What the differences are, the appellant does not explain. What the alleged differences are, that would not offend greviously fundamental constitutional rights, the record does not disclose.

His facts are wrong, if as the defender of the towns, he is playing the role of David, because the population of the towns in New York State exceeds the city population in 32 of the 36 counties in New York which contain cities, although in Niagara County the town population does not (A. 34, 35).

The word encroachment, to describe the position of the appellants, fits. Encroachment is an old English territorial word meaning to trench, or to intrude, by invidious or gradual advances upon the territory of another. *Oxford English Dictionary,* (1971). The fencing in or out description of restrictions on the franchise by this Court in several earlier cases does not seem adequate to describe the invidious discrimination of a classification of this nature.

The appellant depicts New York State as consisting of cities and towns upon which County government is to be superimposed by the proposed County Charter. In reality, the County is the earliest unit of general purpose local government in New York State. The County unit came into being in 1683. In 1777, the Counties of the State were divided into towns. 11 McKinney's Laws of New York, County Law ps. IX *et seq.*, historical note; 61 McKinney's Laws of New York, Town Law, ps. VII, XI Early History of Town Government.

In addition, the County Charter form of local government, with adoption thereof to be brought about by a simple majority of the voters of the County, has been advocated by the most distinguished experts on the subject of local government in New York State as the appropriate means of providing effective and accountable local government in New York State, particularly in the urban counties. Proceedings of the 1967 Constitutional Convention of the State of New York, Vol XII, Index P. 35, Proposed Constitution Art XI, § 1 i(1); Debates, Proposition 1383-B, Proceedings, *supra* Vol. III, p. 572-607. See also the report of the New York State Temporary State Commission on the Constitutional Convention, (1967) Vol. 13, Local Government. The vote in favor of the proposition providing for majority approval upon a referendum for a County Charter was unanimous, Proceedings, *supra,* P. 607. The proposed Constitution, which contained numerous controversial provisions, was submitted to the electorate as a single item and was defeated.

In attempting to justify the dual box voting scheme in Point II of his brief, the appellant is inaccurate in several respects. He contends that city voters have a majority of 10.5 million city residents as against 7.5 million town residents in New

York State to repeal Article 9 § 1 (h) (1). But he overlooks the fact that this provision of the New York Constitution does not apply to counties wholly contained in a city, which means the five counties of the City of New York (App. br. p. 31). Approximately 8 million New York City residents should be subtracted, leaving 2.5 million city residents and 7.5 million residents of the area outside the cities, who are effected by the double majority provision.

The appellant persists in alleging that the proposed County Charter realigns and transfers existing governmental functions and prerogatives from the towns and the cities of the County to the proposed form of County government (App. br. p. 32). Both the 1972 and 1974 County Charters expressly guarantee that no function, facility, duty or power of any city or town of the County shall be transferred, altered or impaired by the proposed Charters:

> "No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code." (A. 27, 73.)

IV. The dual box restriction on the franchise does not meet the stringent test of justification; that it is necessary to promote an articulated state goal and must constitute a compelling state interest.

The above test was described in *Kramer vs. Union Free School District,* 395 U. S. 621, 89 S. Ct. 1886 (1969) and in subsequent cases. It is applicable here. Although in virtually every case of a voting inequality or classification, the government unit that has established a deviation from a single unit, numerically equal voting scheme has attempted to

show some rational basis therefor, the appellant argues herein that where the voters live in the county may determine the value of their voting franchise.

Gray vs. Sanders, 372 U. S. 368, 83 S. Ct. 801 (1963) was intended to put an end to that argument with the following language:

> "Once the geographical unit for which a representative is to be chosen is designated all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'We the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

Eight years later in *Gordon vs. Lance*, 403 U. S. 1, 4, 91 S. Ct. 1889, 1891 (1971) the Chief Justice stated the holding in Gray as follows:

> "The defect this Court found in those cases lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election."

The appellant having failed to demonstrate that the classification into city voters and other than city voters, has any basis other than to classify voters based upon where they choose or happen to live, the classification may not stand and the judgment of the District Court should be affirmed.

V. The Sovereignty argument of the appellant is irrelevant.

The issue in this case is not whether a state has any obligation to extend voter participation to units of local government. The issue is the right of suffrage when the State chooses to permit voter participation in local government.

***Avery vs. Midland County, Texas*, 390 U. S. 474, 88 S. Ct. 1114 (1968) extended the protection of the right of equal suffrage to the area of local government and prohibited the restrictions upon the franchise which the appellant defends.**

The method by which the appellant attempts to extricate himself from *Gomillion vs. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960), after reciting that the circumvention of a federally protected right is a limitation on state power, is ingenious but is all semantics.

In *Sailors vs. Board of Education*, 387 U. S. 105, 87 S. Ct. 1549 (1967), he overlooks the fact that the state had not extended voter participation to the local government unit and that, at least as to non-legislative local officers, the State had the right to decide whether to appoint or elect them.

VI. The argument by appellant from previous cases, that the dual majority scheme is not offensive to equal protection, is not supported by those cases.

He begins his argument by urging that the New York Constitution was adopted by a majority of all the voters of New York and the New York Legislature is fairly representative of all the people (App. br. p. 25). Such facts are immaterial to the issue before this Court. In *Lucas vs. Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 736, 84 S. Ct. 1459, 1474 (1964) this Court wrote:

> "A citizens constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

The principle was adopted in *Avery vs. Midland County, Texas,* 390 U. S. 474, 481, 88 S. Ct. 1114, 1118 (1968) and in *Kramer vs. Union Free School District No. 1* 395 U. S. 621, 628, 89 S. Ct. 1886, 1890 (1969).

The appellant cites *Gordon vs. Lance,* 403 U.S. 1, 91 S. Ct. 1889 (1971) but the reliance is misplaced. The classification of voters into identifiable classes, city voters and other than city voters, is the kind of classification that *Gordon* called discriminatory. In *Gordon,* this court emphasized the soundness of *Gray vs. Sanders,* 372 U. S. 368, 83 S. Ct. 801 (1963), and said the defect lay in the dilution or debasement of voting power because of group characteristics, geographic location and property ownership, and the fact that votes were discarded solely because of where they were cast, all of which violated the equal protection clause.

The appellant then calls up *Dusch vs. Davis,* 387 U. S. 105, 87 S. Ct. 1549 (1967) to support his argument. The *Dusch* opinion, to the contrary, condemns the invidious discrimination of classifying voters based upon their race, their sex, their economic status or their place of residence, virtually all of which forms of discrimination are implicit by encircling the cities. The Court found no fault with requiring district councilmen to reside in each of their seven districts, because they were voted for citywide. They were city councilmen just as the voters of Niagara County were all county voters and the representatives they would elect, pursuant to the proposed County Charters, would be county officials.

Finally the appellant cites *Salyer Land Company vs. Tulare Lake Basin Water Storage District,* 410 U. S. 719, 93 S. Ct. 1224 (1973). This is a special interest or special purpose case wherein equal suffrage was held to be inapplicable because the Tulare Lake Basin Water Storage District was not a unit of general purpose government, such as Niagara County. It is, not only, not authority for the appellant's plea, but Justice Rehnquist in describing what is not justification for restricting the franchise, establishes the case for the conclusion that the equal protection clause is offended by Article 9 § 1 (h)(1) of the New York Constitution and its statutory implementation.

The dual voting box, the double majority of the New York Constitution is an insidious restriction upon the franchise which violates the right of equal suffrage guaranteed by the Fourteenth Amendment and the scheme should not stand.

VII. The remand of this Court was carried out properly by the District Court.

The responsibility of the District Court was to obey the mandate of the remand. *Briggs vs. Pennsylvania R. Co.,* 334 U. S. 304, 68 S. Ct. 1038 (1948). The decision as to the method of proceeding was in the sound discretion of the District Court. *Epstein vs. Goldstein,* 110 F. 2d. 747 (CA 2d Cir. 1940); *5A Moore's Federal Practice,* ¶52.13, p. 2765 (1975); *6A Moore's Federal Practice,* ¶59.16 p. 59-294 (1975).

On October 8, 1975 the District Court conducted a hearing. The 1974 Charter and the statement of the Board of Convassers of Niagara County in relation to the votes cast for the 1974 County Charter were made exhibits in the record (A. 70, 128). Counsel for the appellant and counsel for all other par-

ties admitted the two Charters were substantially the same (A. 165). The District Court perused the two Charters (A. 165) and made the decision that the declaration of the plaintiffs-appellees fundamental constitutional rights should be enforced by ordering the 1974 Charter to be in full force and effect as the instrument defining the form of local government for Niagara County.

The District Court properly exercised its jurisdiction pursuant to the remand from this Court.

The appellant's contentions, that the District Court did not interpret properly the remand and that the remand was solely for the purpose of determining the issue of mootness, do not appear to have any merit nor has such objection, if it has any merit, been preserved adequately.

The remand appears clear by its terms and authorizes the District Court's action which was granted in the judgment of December 15, 1975.

Secondly, the practice seems to be that if there is an issue of the proper interpretation by the lower Court of a remand, that such issue should be the subject of a clarificatory motion in the appellate court. *6A Moore's Federal Practice*, ¶ 59.16, p. 59-294 (1975).

Thirdly, the appellant had the opportunity and responsibility to preserve his point that the District Court had no authority pursuant to the mandate to implement the 1974 Charter, by appealing from the District Court's order denying the plaintiffs-appellees' motion to amend the amended complaint. The appellant did not appeal from that portion of the judgment of December 15, 1975. We urge that the appellant has thereby precluded itself from questioning the decision of the District Court to exercise jurisdiction over the 1974 County Charter.

VIII. *Res Judicata* is not a good defense.

The decision and reasoning of the District Court, that the plaintiffs-appellees, the aggrieved class of voters in this cause, were not parties nor in privity in the first action; that the requirements of a class action were not met nor was it clear they could have been met as to adequate representation or adverseness of interest if tested; that the standing of the County of Niagara to bring an action on behalf of an aggrieved class of some of its citizens and voters in a case of this nature is not clear; is well substantiated and should not be disturbed by this Court (A. 136-138).

In addition, the refusal of the Niagara County Legislature upon the request of the plaintiff-appellee Shedd, to appeal the judgment of dismissal in the prior action before it became final, or to obtain an extension of the time to appeal to give the plaintiff-appellee Shedd the opportunity to intervene in the prior action, is probative on the ability of the County to adequately represent the aggrieved voters on this issue and to have the necessary adverseness of interest. The claim of the appellant that the plaintiffs-appellees made no effort to appeal or intervene is inaccurate (A. 134, 183-184).

On May 1, 1973, Mr. Shedd appeared before the Niagara County Legislature and requested it to act as to protect the constitutional rights of the citizens of Niagara County who voted for the 1972 Charter. The County Legislature refused. The event was reported in the local press on May 2, 1973 (A. 185). The judgment of dismissal in the prior action became final on May 3, 1973.

Finally, the defense of *res judicata* is asserted in this Court only by the intervenor-appellant. The appellant was not a party to the prior action, nor do we believe that any case could be made that it had any right of privity in that action. The appellant has failed to demonstrate that it has any rights stemming from the dismissal of that complaint. The appellant's non-party status in the prior action should preclude the appellant from asserting the defense of *res judicata.*

IX. There is no reason for not giving the aggrieved voters the benefit of their fundamental constitutional rights retroactively.

From the beginning, as aggrieved voters have established the infringement upon their fundamental constitutional right of equal suffrage, they have been given full equitable relief. *Baker vs. Carr* 369 U. S. 186, 250, 82 S. Ct. 691, 727 (1962); *Reynolds vs. Sims,* 377 U.S. 533, 585, 84 S. Ct. 1362, 1393 (1964).

The cases cited by the appellant, *Cipriano vs. City of Houma,* 395 U. S. 701, 89 S. Ct. 1897 (1969) and *Phoenix vs. Kolodziejski,* 399 U. S. 204, 90 S. Ct. 1990 (1970) involved bond elections in which retroactivity would have damaged the credibility of municipal bonds and required that the fundamental constitutional rights should only be applied prospectively.

There is no sufficient reason for this Court not to give the plaintiffs-appellees, the aggrieved class of voters, the full benefit of their franchise once their fundamental constitutional rights are finally established.

X. The mootness and jurisdiction arguments of the appellant are irrelevant.

The remand by this Court on the subject of the 1974 Charter became the law of the case and the antecedent events should have no further relevance. The issue of the proper interpretation of the remand by the District Court has been discussed in Point VII herein.

There is in this portion of the appellant's brief (IV and V) the repeated assertion that the plaintiffs-appellees abandoned the 1972 Charter between the January 9, 1975 judgment and the October 6, 1975 remand by this Court. The assertions have no relevancy to the legal issues herein but we believe the contention should not stand unanswered.

At all times, the plaintiffs-appellees urged the District Court and the Niagara County officials that the District Court judgment of January 9, 1975 must be complied with and that any deviation from it could only be with the approval of the District Court. Finally on August 20, 1975, after the County Clerk of Niagara County failed to comply specifically with the District Court's judgment, the plaintiffs-appellees moved for further injunctive relief in furtherance of the judgment of January 9, 1975 pursuant to Rule 62 (c) *Federal Rules of Civil Procedure* (A. 150-160).

The foregoing may only bear upon whether the class of aggrieved voters have at all time acted responsibly and forthrightly to protect and enforce their fundamental constitutional right of equal suffrage, but we believe that it is a principle upon which this Court should not have a mistaken impression.

CONCLUSION.

The judgment of the District Court granted on January 9, 1975, as reinstated and amended by the judgment granted on December 15, 1975, should be affirmed.

Respectfully submitted,

JOHN J. PHELAN,
Attorney for Plaintiffs-Appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated,
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October 1976.

FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER,
Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.
and FRANCIS W. SHEDD, Individually and on Behalf of
All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF ON BEHALF OF APPELLANTS

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TABLE OF CASES.

STATUTES.

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and

JOHN J. GHEZZI, Secretary of State of the State of New York ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

REPLY BRIEF ON BEHALF OF APPELLANTS

The District Court and the appellees premise their analysis of the issues, and base their conclusions, on the erroneous *assumption* that irrespective of the nature or purpose of a state-sponsored elective process, the one-person, one-vote principle is a constitutional mandate. The District Court articulated its holding in the following language:

"The State of New York, having chosen to create subordinate units of government, is not immune from judicial scrutiny when confronted with a claim that its exercise of sovereign power results in the imposition of unconstitutional conditions upon the voters of that political subdivision" (A. 141).

The appellees recite the assumed conclusion as follows:

"The federal government is not forcing its will on the State of New York by the District Court's decision but only saying that if you hold an election, each citizen equally affected has an equal vote" (Page 16, brief of appellees Graf and Comferford)[1].

"There is no valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election" (Page 11, brief of appellees CALL and Shedd).

[1] The current position of the appellees, Graf and Comerford, and the exceptional failure of the Attorney General of the State of New York to file a brief on this appeal and to participate in argument (despite the requirements of Sections 63 and 71 of the Executive Law of New York; Volume 18, McKinney's Consolidated Laws of New York), raise serious questions as to whether the District Court gave consideration to an actual case or controversy, benefited by the development of facts and the exposition of applicable legal principles normally resulting from the adversary system. In their answer to the complaint (A. 36), appellees Graf and Comerford admitted the substantive allegations claiming unconstitutionality, but raised the affirmative defense of *res judicata* by reason of the District Court's previous decision in *County of Niagara v. State of New York* (A. 178-82). Those appellees requested "the court to dismiss the action of the plaintiff on the grounds that no substantial federal question exists" (A. 36). Before this Court, those appellees take a contrary position. In the Court below, the State Attorney General urged dismissal of the complaint, but failed to appeal the adverse judgment and failed to participate in this appeal. No proof was offered by any of the defendant-appellees with respect to the governmental reasons for the state's constitutional and statutory provisions governing the method of effecting changes in existing forms of county government; the District Court granted summary judgment on the basis of extraordinarily spare cross-motion papers.

This Court has, however, carefully avoided any such extreme position or result, declining to impose the one-person, one-vote principle as a constitutional mandate with respect to a variety of elective or referendum processes: *Wells v. Edwards*, 347 F. Supp. 453, aff'd. 409 U.S. 1095 (1973); *Fortson v. Morris*, 385 U.S. 231 (1966); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *Sailors v. Board of Education*, 387 U.S. 105 (1967). That the one-person, one-vote principle does not have universal, mechanical application to all elective or referendum processes is further emphasized by this Court's recent refusal to grant certiorari in *Ripon Society v. National Republican Party*, 525 F.2d 567 (1975), cert. den. February 23, 1976, 96 Sup. Ct. 1147, 1148.

The decision of the Court of Appeals in *Ripon* appropriately recognizes this Court's growing sensitivity to the necessity of avoiding a simplistic, mechanical approach, and to require instead careful analysis to determine if the proposed extension of the principle is compatible with its rationale and is required in a balancing of competing constitutional precepts.

In *Ripon*, the Court of Appeals upheld the delegate allocation formula adopted for the purpose of determining representatives to the Republican national nominating convention, and in so doing commented on the exceptions to the one-person, one-vote requirement as follows:

"They do demonstrate, however, that the principle of one person, one vote is not an absolute, to be unthinkingly invoked every time two or more persons are selected to make decisions on other people's behalf, even if the making of those decisions is very plainly 'state action.'

> The constitutional command is not one person, one vote but equal protection of the laws, and what it requires by way of representation in a given assembly must depend on the purposes for which the assembly is convened and the nature of the decisions it makes."

The *Ripon* decision involved a balancing of the rights of the major political parties under the First Amendment to choose the manner in which delegate strength would be allocated among the states, and the Fourteenth Amendment Equal Protection Clause guarantees. The Court of Appeals there stated:

> "What is important for our purposes is that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation" (595 F.2d at 585).

That statement of the Court of Appeals can be modestly paraphrased for application to the case at bar as follows:

> What is important for our purposes is that a State's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the State and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation.

The starting point here must be the conceded proposition that the state has the sovereign and exclusive right to determine and to develop its own internal governmental apparatus and instrumentalities. As appellees acknowledge: "New York State, with a proper procedure, could abolish all referenda for adoptions [sic] of charters in political subdivisions" (Page 15, brief of appellees Graf and Comerford).

As this court said in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960): "When a state exercises power wholly within the

domain of state interests, it is insulated from federal judicial review."[2] As long as the exercise of that conceded power does not do violence to some other constitutionally protected right, the federal judiciary should not impose its judgment as to the advisability or wisdom of policy decisions made by the people with respect to internal government structure.

Decisions were obviously made by the voters in New York, directly through approval of the State Constitution and indirectly through statutory implementation, that although there should be voter participation in effecting changes in the established and traditional structure of county government, that participation should be on a basis other than simple majority. The people of the state made the political decision that in order to insure that such changes would come about in a deliberate fashion, with due recognition of the varying interests and attitudes of urban and nonurban citizens, that a complementary majority vote would be required. The state could as well—without impinging upon the constitutional rights of any of its citizens—have decided that such changes could only be made by the governor, or by some appointed commission, or in some other fashion in no way involving direct voter participation, and no citizen could successfully raise a judicial constitutional challenge. There would be no denial of Equal Protection under the Fourteenth Amendment as to the *method* selected by the state to determine when and what changes, if any, should be made in the existing structure of county government. In short, provided that the result is a

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[2] It is significant that appellees are unable to answer appellant's analysis of the import of the *Gomillion* decision, attempting to avoid the conclusions of that analysis with the faint and unsupported assertion that the analysis "is ingenious but is all semantics" (Page 17, brief of appellees CALL and Shedd).

Republican form of government, there would be no "federally protected right" transgressed.

But appellees argue, and the District Court held, that if a state allows any direct voter participation in the decision-making process as to changes in the structure of subsidiary governmental subdivisions—a matter within the exclusive sovereign domain of the states—there is thus immediately created a previously nonexistent constitutional right to require that any and all voter participation be on the basis of one person, one vote—or not at all. The illogic of such reasoning is apparent, and is not supported by the decisions of this Court.

The judgment below should be reversed.[3]

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants,
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Floyd Snyder,
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November 1976.

[3] Annexed as an Appendix are brief comments on various assertions made in appellees' briefs which require amplification or correction.

APPENDIX: OBSERVATIONS ON SELECTED STATEMENTS IN THE BRIEFS OF APPELLEES

The Brief of Appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd

Page 5:

A. *Appellees' Statement:* "The population of the cities of Niagara County as a unit is 147,026. The population of the area outside the cities is 88,694 (A. 34). In the 1972 referendum, a total of 55,353 votes were cast. 11,594 negative notes were cast in the towns of Niagara County, 20.93% of the total vote, which minority vote prevented the adoption of the Charter (A. 12)."

Observations: 48% (47.8%) of the total of all votes cast on the charter referendum opposed its adoption.

B. *Appellees' Statement:* "On May 1, 1973, the plaintiff-appellee Shedd requested the Niagara County Legislature, in session, to appeal the dismissal of that action, to preserve it, to give him an opportunity to intervene or commence a separate action as a voter and on behalf of all other voters throughout the County who voted in favor of the Charter. The Niagara County Legislature refused the request of Mr. Shedd (A. 183-185)."

Observations: Despite the refusal of the Niagara County Legislature to prosecute an appeal from the judgment of the District Court dismissing the complaint in *County of Niagara v. State of New York*, appellee Shedd made no effort to obtain intervention in the case for the purpose of preserving appeal rights and prosecuting an appeal. The Niagara County ap-

pellees, Graf and Comerford, make the following concession in their brief at page 10: "These appellees concede that there was an identical issue in the prior action as in the action presently before the court."

Page 6:

A. *Appellees' Statement:* "In 1974, 36,808 votes were cast in the referendum, 8,222 negative notes were cast in the area outside of the cities of Niagara County, 22.33% of the total vote, which minority vote prevented adoption of the Charter.

Observations: In the 1974 charter referendum, 48% (47.4%) of the total of all votes cast opposed its adoption.

B. *Appellees' Statement:* "The Secretary of State of the State of New York certified the 1972 Charter as the form of local government for Niagara County. This action the District Court had enjoined. On February 28, 1975, the Secretary of State also certified the 1974 Charter as an independent act (Record-¶ 28, app. petition in State Court proceeding)."

Observations: Apparently, without authorization from the District Court, and contrary to the explicit provisions of the January 9, 1975 judgment, the New York State officials certified both the 1972 and 1974 charters on the same day, February 28, 1975, one day after the District Court granted an order to show cause for intervention of the Town of Lockport and Floyd Snyder (See Appendix 4, pages 43 and 44 of appellants' brief on the issue of mootness).

Page 7:

A. *Appellees' Statement:* "The County Attorney contended the judgment of January 9, 1975 had become moot."

Observations: *Appellants* contended that the January 9, 1975 judgment had become moot (appellants' May 22, 1975 motion to vacate judgment; Appendix 5, pages 45-53, to appellants' brief on the issue of mootness). The Niagara County appellees subsequently conceded that their actions and the actions of the New York State officials had rendered the judgment of January 9, 1975 moot.

B. *Appellee's Statement*: "In its statement of facts, the appellant is inaccurate as to certain facts which, we believe, should be corrected. In the case of the settlement of the January 9, 1975 judgment which implemented the 1972 Charter, when the plaintiffs-appellees moved to settle that judgment, the Niagara County attorney requested in a letter to the District Court a stipulation that the judgment apply to the 1974 Charter (Record and Appendix A-P. 10 of motion to affirm, plaintiffs-appellees, April 1976)."

Observations: In connection with the settlement of the judgment which was entered on January 9, 1975, the Niagara County appellees requested the District Court to take "judicial notice" of the 1974 charter referendum and to amend the judgment of the Court "to include the 1974 charter, allowing the State Attorney General's office to appeal from the 1972 charter passage and the 1974 charter passage." Reference was made to the "possibility" of proceeding by way of stipulation (See December 10, 1974 letter of County of

Niagara Attorney to Judge Curtin; Appendix 1, pages 27-8, to appellants' brief on the issue of mootness). The District Court refused to proceed in the fashion requested (See January 9, 1975 judgment, A. 145).

Pages 7 and 8:

Appellees' Statement: "On return of the motion to settle the judgment, the plaintiffs-appellees, in open Court, agreed to stipulate, but the Attorney-General of the State of New York refused to enter into a stipulation and there being no motion before the Court on the subject or an appropriate application, the Court made no determination of such issue and granted the judgment prepared by the plaintiffs-appellees."

Observations: There is no support in the record for these assertions.

Page 8:

Appellees' Statement: "The appellant is also inaccurate that the plaintiffs-appellees concurred that the 1974 Charter should be implemented, rather than the 1972 Charter, without authorization of the District Court.

"At all times, the plaintiffs-appellees urged the District Court and the County officials of Niagara County that the judgment of the District Court must be specifically complied with."

Observations: On May 20, 1975, counsel for appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd wrote the District Court, stating in part:

"This letter is intended to state the position of the plaintiffs in the above action concerning the application of the intervenor-defendants for a stay of the election of a Niagara County Executive and Niagara County Controller in the 1975 general election.

* * *

"The plaintiffs do not object to the action of the New York Secretary of State and the County of Niagara to implement the 1974 Niagara County Charter. The decision is a voluntary implementation of the declaration of the right of suffrage of the voters of Niagara County by this Court and is consistent with it."

Page 10:

Appellees' Statement: "It [the New York State procedure] is the dual box voting procedure rejected in *Hill v. Stone* 421 U.S. 289, 95 S. Ct. 1637 (1975)."

Observations: The New York State procedure under attack in this case is *not* "a dual box voting procedure." The *Hill v. Stone* procedure was a specially designed attempt to obtain a final elective decision in the face of a then-pending constitutional challenge to a "property rendering" condition to voting. The effect of the dual box procedure was that the nonrenderers could help defeat a bond issue, but they could not help pass it. That is not the case at bar since all voters could help both to pass or to defeat a proposed change in the structure of county government. It is misleading to characterize the New York complementary majority procedure as a "dual box" procedure similar to that reviewed in *Hill v. Stone, supra.*

The Brief of Appellees Graf and Comerford

Page 14:

A. *Appellees' Statement:* "A new referendum on the charter proper would result in almost complete chaos in Niagara County government and impair the validity of official acts since January 1, 1976. It would also produce years of litigation and a multiplicity of lawsuits. This could not be an equitable result nor an economically provident one."

Observations: These dire predictions are not supported by anything in the record. The allegations of "chaos," "years of litigation" and a "multiplicity of lawsuits" are extra-record, nonfactual speculations. As past experience in similar matters has documented, the transition back to the preexisting legislative form of county government can be accomplished in a sensible fashion under the supervision of the District Court.

B. *Appellees' Statement:* "In the general elections of November, 1975, political power was taken from one major party and given to another by the will of the voters. Naturally, the losers want to change this result, if possible, by destroying the 1974 charter. They want to change the result of the recent elections, after they have been held."

Observations: This inappropriate, extra-record assertion is obviously designed to create the false impression that this appeal is politically motivated by the "losers" in the November 1975 elections under the charter. This is, of course, not the case. The intervening appellants are the Town of Lockport and its Supervisor, Floyd Snyder, neither having been involved as candidates in the November 1975 elections. In-

tervention was obtained and this appeal processed many months before the November 1975 elections were held and the results known.

Page 20:

A. *Appellees' Statement:* "Also, if census statistics are resorted to, there is an unlimited potential for discrimination of blacks within the cities of the County of Niagara. This is a consideration worth noting and for requiring a strong state interest if defendant-appellants are to justify a dual referendum requirement."

Observations: There is nothing in the record to support these assertions. It is unfortunate that appellees seek to import racial considerations into this case on brief to this Court without any record support, and contrary to fact. The Court will note that in 53 counties of the state out of the total 57 listed in Exhibit B to the complaint (A. 33-5), the total population in towns *exceeds* the total population in cities within the county.

B. *Appellees' Statement:* "First, the dual majority requirement of the instant case does not provide, as defendants-appellants suggest, for a simple majority vote."

Observations: Appellants have made no such suggestion.